DIGITAL COMMUNICATION DEVICES AND ONLINE STUDENT SPEECH IN PUBLIC SCHOOLS: A PROPOSED TEST COMBINING FIRST AND FOURTH AMENDMENT CONCERNS

By

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To my mom, dad and brother
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I want to thank my parents and my brother for their encouragement and support. I also want to thank my thesis committee members for their hard-work and support.
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This thesis analyzes First and Fourth Amendment tests applied by educators and courts in public high schools to online student speech and personal communication devices. It proposes a new test – the digital-communications standard – to yield more fair and consistent results. Accounting for social science and physiological research regarding adolescent vulnerabilities, the proposed test incorporates legal principles from Judge Learned Hand’s famous BPL formula, Title IX of the 1972 federal educational amendments and the T.L.O. Fourth Amendment test. This thesis then applies the proposed test to three hypothetical scenarios that demonstrate its ability to produce fair and consistent results.
CHAPTER 1
INTRODUCTION

In early 2000, high school senior Nick Emmett created a webpage from his home outside of school hours.\(^1\) It contained mock obituaries of classmates and featured a poll allowing site visitors to vote on who would “die” next.\(^2\) As a result of Emmett’s webpage, Kentlake High School’s principal placed Emmett on an emergency expulsion.\(^3\)

Similarly, eighth-grader Aaron Wisniewski was suspended in 2001 after creating an AOL Instant Messaging icon on his parent’s home computer.\(^4\) The icon featured a small drawing of a gun being fired at a head, with red dots above it, presumably representing blood.\(^5\) Beneath the drawing were the words “Kill Mr. VanderMolen,” who then was Wisniewski’s English teacher.\(^6\) Fifteen of Wisniewski’s friends saw the icon through AOL Instant Messaging.\(^7\) His school only found out about it when a student brought it to Mr. VanderMolen’s attention.\(^8\)

Both Emmett and Wisniewski brought federal lawsuits against their respective school districts alleging the disciplinary actions violated the First Amendment\(^9\) right of free speech. But

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\(^2\) Id. at 1089.

\(^3\) Id.

\(^4\) Wisniewski v. Bd. of Educ., 494 F.3d 34, 35 (2d Cir. 2007).

\(^5\) Id at 36.

\(^6\) Id.

\(^7\) Id.

\(^8\) Id.

\(^9\) The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See Gitlow v. New York, 268 U.S. 652, 666 (1925).
despite very similar facts, the outcomes were entirely different. A U.S. District Court in Washington declared Emmett’s suspension unenforceable because his speech was unlikely to cause a substantial disruption on campus. In contrast, the U.S. Court of Appeals for the Second Circuit found Wisneiwski should have foreseen that his icon would come to the attention of school officials and, in turn, that it would cause a substantial disruption in school.

The different outcomes in these factually comparable cases is something that occurs frequently today. Carolyn Schurr Levin, an attorney and media law adviser for the Stony Brook University School of Journalism, opines “that because of the current state of uncertainty, the time has come to redefine the Tinker disruption standard in light of the way students are incorporating social media messaging into their everyday communication routines.” Levin’s reference here is to the seminal U.S. Supreme Court 1969 ruling in Tinker v. Des Moines Independent Community School District. The inconsistency in case outcomes is largely due to the lack of guidance from the Supreme Court on how to rule on off-campus speech and the enormous discretion and deference afforded to educators at the discipline level.

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10 Compare Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000) (holding the webpage did not permit the school to discipline because it did not cause a substantial disruption), with Wisniewski v. Bd. of Educ., 494 F.3d 34, 35 (2d Cir. 2007) (holding the icon could have caused a substantial disruption and thus was punishable).

11 Emmett, 92 F. Supp. 2d at 1089.

12 Wisniewski, 494 F.3d at 36.

13 See Layshock v. Hermitage Sch. Dist, 650 F.3d 205 (3rd Cir. 2011) (finding an online MySpace profile making fun of a teacher to be protected by the First Amendment) with Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011) (finding a website allegedly mocking a student not to be protected by the First Amendment).


Judge Greg Costa, concurring in the fractured 2015 ruling by the U.S. Court of Appeals for the Fifth Circuit in *Bell v. Itawamba County School Board*, asserted that “this court or the higher one will need to provide clear guidance for students, teachers, and school administrators that balances students’ First Amendment rights that *Tinker* rightly recognized with the vital need to foster a school environment conducive to learning.”16 When the U.S. Supreme Court was given the opportunity to hear the off-campus speech case of *Bell*, however, it declined to do so, thus leaving “[f]ederal and state courts across the country . . . totally, hopelessly fractured on the question of First Amendment protection for students’ online speech.”17 Further convoluting the issues are school administrators’ use of Fourth Amendment searches of communication technologies to uncover such speech.

It is well known that public school students do not shed their constitutional rights when they enter school grounds. As far back as 1923, courts found students retain rights afforded by the U.S. Constitution.18 Writing more than forty-five years ago for the majority in *Tinker*, Justice Abe Fortas famously opined for the nation’s high court that “[i]t can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate.”19

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18 *Meyer v. Nebraska*, 262 U.S. 390 (1923) (finding a law prohibiting teachers from teaching languages other than English unconstitutional under the Fourteenth Amendment because it infringed on students’, parents’ and teachers’ liberties); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding unconstitutional an act requiring parents to send children to public schools because it infringed on fundamental rights).

Of the four Supreme Court cases governing speech rights in public schools,\textsuperscript{20} however, none involve digital communication technologies such as smartphones and tablets. Lower courts are struggling to apply older case law to new situations the Supreme Court did not envision back in 1969 when \textit{Tinker} was decided, thereby leading to conflicting results for similar situations across the nation.\textsuperscript{21}

Frank LoMonte, executive director of the Student Press Law Center, analyzed the contradictory results in a 2014 law journal article.\textsuperscript{22} In addressing the courts’ compulsory school decisions, LoMonte observed that “[t]he Fourth and Eighth Circuits have expressly treated off-campus speech on social media as the functional equivalent of on-campus speech, equally subject to school authority within the bounds of \textit{Tinker}.”\textsuperscript{23} He also noted that “[t]he en banc Third Circuit has expressed doubt as to whether \textit{Tinker} is adequately protective of speech taking place on the Internet outside of school time or school functions, while the Second Circuit has equivocated.”\textsuperscript{24}

But the issue examined in this thesis is not solely about free speech; it also affects privacy. Indeed, the increasingly important privacy interests associated with smartphones and personal communication devices are creating complicated issues involving Fourth Amendment\textsuperscript{25}


\textsuperscript{22} Frank D. LoMonte, \textit{Fouling the First Amendment: Why Colleges Can’t, and Shouldn’t, Control Student Athletes’ Speech on Social Media}, 9 J. BUS. & TECH. L. 1, 9-14 (2014).

\textsuperscript{23} \textit{Id.} at 12.

\textsuperscript{24} \textit{Id.} at 12-13.

\textsuperscript{25} The Fourth Amendment to the U.S. Constitution provides that:
searches and seizures in public schools. Case law suggests a higher standard should be applied to searches of electronic devices, similar to a strip-search standard. But how schools can balance the need to maintain an effective and safe learning environment while still safeguarding students’ free speech and privacy rights is akin to walking a tightrope.

One of the most important concerns educators now confront in schools is student safety in the face of cyberbullying. Cyberbullying is an increasingly common problem because access to the Internet is readily available to adolescents. Pepperdine Professor Barry McDonald considers cyberbullying “a major social problem . . . that can frequently lead to tragic consequences for our nation’s youth.” He references a 2011 conference held by then-President Barack Obama on the subject of bullying prevention as evidence of the magnitude of the problem.

The Cyberbullying Research Center defines cyberbullying as “when someone repeatedly harasses, mistreats, or makes fun of another person online while using cell phones or other electronic devices.” In fact, kids who are cyberbullied are more likely to have additional health problems, use alcohol and drugs, and have lower self-esteem. Cyberbullying and its effects are

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.


27 Barry P. McDonald, Regulating Student Cyberspeech, 77 Mo. L. Rev. 727, 727 (2012).

28 Id.


major concerns because high school students constitute a unique population. Specifically, social scientists conclude the teenage years are crucial for developing one’s identity. Even the slow-to-adapt-social-science courts have recognized the heightened vulnerabilities of high school-aged students. Balancing a student’s speech and privacy rights against safety concerns thus becomes a significant challenge.

The current test compulsory schools use to determine when speech deserves punishment often is some form of a “disruption” standard derived from the U.S. Supreme Court’s Tinker decision. Courts vary on how they apply this test to off-campus speech, but,

32 David A. Kinney, From Nerd to Normals: The Recovery of Identity among Adolescents from Middle School to High School, 66 SOCIOLOGY OF EDUC. 21, 21-23 (1993) (discussing the teenage years and the relevant literature on the teenage years).
33 Redding, 557 U.S. at 365.
essentially, they determine that as long as the speech could foreseeably cause a substantial
disruption on school grounds, then students may be punished.\textsuperscript{36} This test, however, affords
educators extraordinary discretion, allowing room for manipulation based on subjective
intentions.\textsuperscript{37} Additionally, the lack of consistency in the past two decades among student speech
cases demonstrates the unfairness of this test.\textsuperscript{38} These results beckon for a new standard that can
address the inconsistencies and level the playing field among student speech cases. Specifically,
because speech is held on personal communication devices, a combined test that protects both
the search of the devices and the speech found on them affords students heightened constitutional
protections. Thus, to find speech on technology, educators must first pass constitutional muster
to search the device. Only then can they proceed to search for potentially harmful speech.

This thesis thus examines weaknesses with the current First and Fourth Amendment tests
that apply to high school students’ Internet speech and privacy, and it proposes and defends a
new test. Chapter one provides an overview of the history and policies of the First and Fourth
Amendments. Additionally, chapter one discusses how lawmakers have reacted to technological
changes as they affect students. Chapter two then introduces social science research concerning
the vulnerabilities of youths and the effects of specific speech related crimes on them. Next,
Chapter three proposes and justifies a new standard that borrows principles from both Judge
Learned Hand’s \textit{United States v. Carroll Towing Co.}\textsuperscript{39} majority decision and Title IX of the 1972

\begin{itemize}
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} 159 F.2d 169 (2d Cir. 1947).
\end{itemize}
Finally, chapter four concludes by arguing that the proposed First and Fourth Amendment test to be applied in public high schools would more accurately calibrate the balance between the privacy and safety interests of students and provide more consistent and predictable results for student speech cases.

40 Title IX provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. §1681(a) (2012).
CHAPTER 2
LEGAL LITERATURE REVIEW

High school students are a unique population.\(^1\) Unfortunately, how courts treat them, in light of an ever-changing technological landscape, is in disarray. This part summarizes key cases that have shaped the application of First and Fourth Amendment rights in public high schools. The first section assesses First Amendment history in public schools, with the first subsection analyzing the four seminal Supreme Court rulings establishing this right. The second subsection then examines how federal appellate courts, district courts and state supreme courts have addressed the free speech rights of students on the Internet and other digital technologies. The second section next assesses Fourth Amendment history in compulsory schools. Finally, the third section examines how lawmakers and courts have addressed changes in communication technology as they affect students.

**First Amendment Protections for Students in Public Schools**

The First Amendment to the U.S. Constitution prohibits governmental entities and officials from making laws that abridge free speech.\(^2\) Courts have ruled that public school students do not lose this right when they enter school grounds, but due to pedagogical needs accompanying schools for minors, courts have found that some restrictions on speech rights are permissible.\(^3\) In assessing these restrictions, courts balance the right to expression with the schools’ need to

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\(^2\) See supra note 9 (setting forth the text of the First Amendment).

maintain order and to educate. The resulting student speech analysis – sometimes known as the traditional student speech analysis – applies only to speech occurring on campus.

In today’s digital world, however, the traditional student speech analysis is insufficient because it fails to adequately account for types of speech never envisioned by courts. Schools, in turn, are punishing students for their off-campus online speech. Indeed, Professor Catherine Ross believes “educators have extended their reach beyond the school into students’ private lives and even their homes, punishing students and referring them to law enforcement authorities based on digital communications sent from students’ own computers outside of school, including adolescent antics and web postings labeled as jokes.”

Professor Mary Sue Backus of the University of Oklahoma School of Law thinks “schools are missing the teachable moment” and that they “have a golden opportunity in the context of student online communication to both inculcate an understanding and appreciation for First Amendment free speech rights that are fundamental to our democratic system, and teach responsible, appropriate use of technology and communication.”

Mobile communication technology is pervasive, with 88% of teenagers having access to a mobile phone and 73% owning a smartphone. Seventy-one percent of teens also have a Facebook account and 92% of teens access the Internet daily. This influx of technology blurs

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4 U.S. CONST. amend. IV.
6 Id.
8 Id.
the line between off-campus and on-campus speech, and courts are struggling mightily to apply
traditional student speech analyses to this technologically driven world.

**On-Campus Speech Cases**

The seminal case establishing that students possess First Amendment rights of free
expression while attending public schools is *Tinker v. Des Moines Independent Community
School District.*\(^9\) In 1965, several students wore black armbands to school to publicize their
objections to the Vietnam War.\(^10\) The school opposed the students’ wearing armbands, sent them
home and suspended them.\(^11\) The students’ families sued, seeking an injunction restraining
school officials from disciplining the students.\(^12\)

The U.S. Supreme Court found that despite the special characteristics evident in a school
environment, students retain a First Amendment right to free speech and expression.\(^13\) The Court
held that restraints on free expression are only allowed when they have actual facts to reasonably
predict the speech will “materially and substantially interfere with the requirements of
appropriate discipline in the operation of the school.”\(^14\) Such predictions must not be based on an
“undifferentiated fear or apprehension of disturbance” but, instead, require “something more
than a mere desire to avoid the discomfort and unpleasantness that always accompan[ies] an
unpopular viewpoint.”\(^15\)

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\(^10\) *Id.* at 504.

\(^11\) *Id.*

\(^12\) *Id.*

\(^13\) *Id.* at 506.

\(^14\) *Id.* at 509.

\(^15\) *Id.* at 508-09.
Importantly, the Court noted the armbands were passive, political speech brought onto campus.\textsuperscript{16} The sole reason for the school authorities action appeared to be based on “an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands . . .”\textsuperscript{17} First Amendment scholar David Hudson believes the Court got it right in \textit{Tinker}, claiming “[s]tudents certainly should have the right to engage in peaceful political speech, including the wearing of armbands to support or protest various issues, such as war, uniform policies, abortion or virtually any other subject.”\textsuperscript{18}

More than fifteen years after \textit{Tinker}, the Court addressed another student speech issue in \textit{Bethel v. Fraser}.\textsuperscript{19} This Court, consisting of “more conservative justices,” gave school authorities “greater leeway to impose limits on student speech.”\textsuperscript{20} The Court found that sexually vulgar and lewd speech spoken on campus conflicted with the “fundamental values of public school education” and thus could be regulated.\textsuperscript{21} In \textit{Bethel}, school administrators punished a student for making sexual innuendos during a speech in a captive audience setting to about 600 students at a school assembly.\textsuperscript{22}

\textsuperscript{16} \textit{Id.} at 508.

\textsuperscript{17} \textit{Id.} at 510.


\textsuperscript{19} \textit{Bethel Sch. Dist. v. Fraser}, 478 U.S. 675 (1986).


\textsuperscript{21} \textit{Bethel}, 478 U.S. at 677.

\textsuperscript{22} \textit{Id.}
In affirming the school’s disciplinary action, the Court expressed three reasons why restrictions on such speech are allowed. First, the Court found that permitting lewd and indecent speech undermines the school’s basic educational mission. Second, prohibiting vulgar and offensive terms is a highly appropriate function of public schools. Lastly, the Court found that society has an interest “in teaching students the boundaries of socially appropriate behavior.”

Notably, Chief Justice Warren Burger remarked there is a huge difference in the passive political protest in Tinker and Matthew Fraser’s sexually lewd speech. In criticizing the Chief Justice’s opinion, former New York Times education editor Fred M. Hechinger said “[t]he Chief Justice may have been motivated by old-fashioned chivalry; but in the contemporary context, he has a sexist ring. Should high-school girls be sent out of the room when Shakespeare’s ‘lewd’ ways of dealing with male sexuality and his frequent sexual metaphors and innuendo appear in literature classes?”

Just two years after Bethel, the Supreme Court heard Hazelwood School District v. Kuhlmeier. The Court there found that student newspapers published as part of the curriculum are not afforded full First Amendment protections and can be censored. Here, a high school

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23 Id. at 681-85.
24 Id. at 685.
25 Id. at 683.
26 Id. at 681.
27 Id. at 680.
30 Id. at 262.
principal removed two articles from a school newspaper relating to divorce and teen pregnancy.\textsuperscript{31} The newspaper was part of a journalism class and all costs were funded by the school.\textsuperscript{32} In allowing the school to censor student speech, the Court reasoned that educators are uniquely positioned to understand the needs of their school and to take measures to ensure safety.\textsuperscript{33} The Court held that educators do not offend the First Amendment in censoring school-sponsored speech “so long as their actions are reasonably related to legitimate pedagogical concerns.”\textsuperscript{34}

Here, the pedagogical concerns related to mastering curriculum pertaining to “the treatment of controversial issues. . .the need to protect privacy. . . and the ethical, legal and moral restrictions imposed upon journalists. . .”\textsuperscript{35} Justice William Brennan, dissenting, agreed an educator may censor “poor grammar, writing, or research” because rewarding that speech would materially disrupt the newspaper’s curricular purpose. But Justice Brennan criticized the Court for finding the educators’ actions were based on such concerns.\textsuperscript{36} He observed, the students were not taught the lesson; the principal censored the students’ work without consulting them.\textsuperscript{37}

Catherine Ross criticizes \textit{Hazelwood}, claiming the “majority picked up where \textit{Fraser} left off, presenting its own reframing of what \textit{Tinker} meant. In the process the \textit{Hazelwood} majority distorted the principles the case stands for.”\textsuperscript{38} The importance of \textit{Hazelwood} is that the Court

\begin{itemize}
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.} at 262-63.
\item \textsuperscript{33} \textit{Id.} at 271.
\item \textsuperscript{34} \textit{Id.} at 273.
\item \textsuperscript{35} \textit{Id.} at 276.
\item \textsuperscript{36} \textit{Id.} at 284.
\item \textsuperscript{37} \textit{Id.} at 285.
\item \textsuperscript{38} ROSS, \textit{supra} note 45, at 52.
\end{itemize}
gave vast deference to school administrators to restrict speech in the name of pedagogical concerns.

In its most recent school-speech decision, the Supreme Court in *Morse v. Frederick* held in 2007 that a principal did not violate a student’s free speech rights by suspending him for hoisting a banner that the principal believed promoted illegal drug use. In 2002, the Olympic Torch Relay passed along a street in front of Joseph Frederick’s high school in Alaska during school hours. Principal Deborah Morse had given students and teachers permission to attend the relay as an approved class trip. Frederick stood on a public sidewalk on the opposite side of the street from his school and, with the assistance of classmates, displayed a fourteen-foot banner reading “BONG HiTS 4 JESUS.”

Although Frederick was off campus, the Court found that his actions were punishable because the speech occurred during school hours and at a school-supervised event. The Court only answered the question of whether advocating illegal drug use was allowed in a school setting. Interestingly, Frederick testified that his speech was “designed to be meaningless and funny, in order to get on television.”

However, Principal Morse, along with a majority of the Court, thought differently. Morse was able to restrict Frederick’s speech because the message he displayed was reasonably viewed

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40 *Id.* at 397.

41 *Id.*

42 *Id.*

43 *Id.* at 403.

44 *Id.*

45 Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006).
as promoting illegal drug use, and the Court found deterring drug use was an important and perhaps even compelling interest.\textsuperscript{46} The Court noted that its decision was limited based on the nature of the speech.\textsuperscript{47} Indeed, Professor Mark Cordes writes that “\textit{Morse} continues the trend of Supreme Court decisions after \textit{Tinker} in which school interests seemingly always trump student speech interests,” but acknowledged that there is “no doubt that \textit{Morse} was a very narrow decision. . .”\textsuperscript{48}

\textbf{Off-Campus Speech Cases}

\textit{Morse} is the closest Supreme Court case dealing with speech that physically occurred off school grounds. The Court in \textit{Morse} found that, despite the speech physically occurring off school grounds, it was treated as if it was on campus because it was during school hours and at an event sponsored by the school.\textsuperscript{49} The Court made clear, however, that speech that occurs outside the school context is not actionable by school administrators and students are afforded full First Amendment protections.\textsuperscript{50} In referring to \textit{Fraser}, the \textit{Morse} Court found that had Matthew Fraser’s speech been delivered in a public forum outside the school context, it would have had full First Amendment protections.\textsuperscript{51}

With the advancement of technology, new problems arise with the traditional student speech analysis, including how to regulate Internet speech. The problem with Internet speech is that although it may originate off campus, it can be accessed on campus or through a search of

\begin{itemize}
  \item \textsuperscript{46} \textit{Morse}, 551 U.S. at 394-95.
  \item \textsuperscript{47} \textit{Id}.
  \item \textsuperscript{49} \textit{Morse}, 551 U.S. at 401.
  \item \textsuperscript{50} \textit{Id}. at 405.
  \item \textsuperscript{51} \textit{Id}.
\end{itemize}
technology. Prior to the Internet, it was very difficult to access speech made off school grounds at a later date. As a result of the courts’ struggles to apply the traditional student speech analysis to Internet speech, they have established different methods for determining when such speech may be punished.\footnote{52 See Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield, 134 F.3d 821 (7th Cir. 1998); J.S. v. Bethlehem Area Sch. Dist., 569 Pa. 638 (Pa. 2002); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007); Evans v. Bayer, 684 F.Supp. 2d 1365 (S.D. Fla. 2010); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011).}

Some circuits retain the off-campus/on-campus distinction but define on-campus speech broadly.\footnote{53 See Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011); S.J.W. v. Lee’s Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012); Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015).} Doing so allows off-campus speech to be categorized as on-campus speech for disciplinary means. Other circuits disregard the off-campus/on-campus distinction and simply apply a foreseeable disruption standard.\footnote{54 See Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010).} Further complicating the matter, the factors courts consider to determine a foreseeable disruption vary, resulting in dissimilar outcomes.

**U. S. Circuit Courts of Appeal decisions**

The U.S. circuit courts of appeal are the second most influential courts in the United States, following only the U.S. Supreme Court.\footnote{55 \textit{Courts Role and Structure}, UNITED STATES COURTS, \url{http://www.uscourts.gov/about-federal-courts/court-role-and-structure}.} Cases that make it to the federal appellate courts have typically been heard by a district court within a federal circuit.\footnote{56 \textit{Id}.} There are eleven numbered circuits, plus the D.C. Circuit and the Federal Circuit.\footnote{57 \textit{Id}.}
circuits, six have ruled on off-campus online student speech. The First, Sixth, Seventh, Tenth, and Eleventh Circuits have remained silent.

Ignoring the distinction between on-campus and off-campus speech, the sole factor the Second Circuit considers is whether the speech creates a reasonably foreseeable disruption on campus. In 2007, it held a student’s violent AOL instant messaging icon could have foreseeably created a substantial disruption and that, in turn, punishing the student for this speech did not violate his First Amendment rights. Similarly in 2008, the court found punishment appropriate where a student encouraged other students to call an administrator.

In the 2007 case of Wisniewski v. Board of Education of the Weedsport Central School District, discussed in the Introduction, a student created an image of a gun firing a bullet into someone’s head and included the words “Kill Mr. VanderMolen,” a teacher at the student’s school. Another student informed the teacher about the icon and brought a printed copy of it to school. The principal initially suspended Aaron Wisniewski for five days and, upon further review, for a whole semester. The court concluded the circulation of the icon to fifteen

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59 Id.

60 See Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

61 Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007).

62 Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

63 Wisniewski, 494 F.3d at 36.

64 Id.

65 Id.
recipients made it “at least foreseeable to a reasonable person, if not inevitable” that it would come to the attention of school authorities.\footnote{\textit{Id.} at 39-40.}

One year later in \textit{Doninger v. Niehoff}, the Second Circuit affirmed the lower court’s ruling that Avery Doninger’s speech created a foreseeable risk of substantial disruption.\footnote{\textit{Doninger}, 527 F.3d at 50.} Doninger, a student council member who helped plan an event called “Jamfest,” was upset about the third postponement and possible cancellation of the event.\footnote{\textit{Id.} at 44-45.} After school, and on her home computer, Doninger posted a message on her publicly accessible blog stating that “Jamfest is cancelled due to douchebags in central office.”\footnote{\textit{Id.} at 45.} She reproduced an email her mother had sent to the district superintendent and encouraged people to “write something or call her to piss her off more.”\footnote{\textit{Id.}.} After learning of Doninger’s blog post, the school prohibited her from running for senior class president.\footnote{\textit{Id.} at 46.} The Second Circuit found that although the post was created off-campus, it was designed to come onto school grounds and cause a disruption. The punishment of Doninger thus was permissible and did not violate her First Amendment right of free speech.\footnote{\textit{Id.} at 45.}

The Third Circuit closely follows the Second Circuit test, requiring a showing of a foreseeable risk of a substantial disruption or material interference with a school need, regardless
of its “geographic technicality.” The Third Circuit also considers whether the off-campus student speech actually entered the school. Unlike the Second Circuit, however, the Third Circuit is less likely to find a foreseeable risk of disruption and sometimes rules in favor of students.

In *J.S. v. Blue Mountain School District*, two students created a fake profile of their principal on MySpace. The profile contained the principal’s picture and fake information describing him as a pedophile and sex addict. It was created on a weekend and at a student’s home computer. The principal argued the MySpace profile caused a disruption in school because there were “rumblings” during school. Specifically, one teacher stated that he experienced a disruption in his class when multiple students discussed the profile. The teacher had to tell the students to stop talking about it three times and had to raise his voice. He also stated, however, that having to tell students to stop talking and get back to work was a regular occurrence.

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73 *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010) (rehearing en banc granted where court changed decision that school could properly discipline student, however, same decision about no substantial disruption was found).

74 *Id.*


76 *J.S.*, 650 F.3d at 920.

77 *Id.* at 921.

78 *Id.* at 920.

79 *Id.* at 922.

80 *Id.* at 922-23.

81 *J.S.*, 650 F.3d at 922-23.

82 *Id.*
The Third Circuit found there was neither a substantial disruption nor “a forecast of substantial disruption” caused by the student’s speech. The court reversed the district court’s grant of summary judgment for the school and remanded the case to determine the appropriate relief, finding that summary judgment for the school would “vest school officials with dangerously overbroad censorship discretion.”

Similarly, in Layshock v. Hermitage School District, the Third Circuit ruled in favor of student speech where the student created an online profile of the school’s principal while off school grounds. The fake profile included humorous answers to questions the profile asked, such as “[a]re you a health freak: big steroid freak” and “[i]n the past month have you gone Skinny Dipping: big lake, not big dick.” Although many students accessed the profile during school, the court found such access to be insufficient to ‘enter the school’. The court reasoned since the student’s speech did not cause a disruption and did not enter the school, his speech was protected by the First Amendment.

The Fourth Circuit retains the off-campus/on-campus speech distinction, unlike the Second and Third Circuit, but broadly defines what constitutes as on-campus. In Kowalski v. Berkeley County Schools, a high school senior created a MySpace group titled “S.A.S.H,”

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83 Id. at 928.
84 Id. at 933.
85 Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3rd Cir. 2011).
86 Id. at 208.
87 Id. at 219.
88 Id.
purportedly standing for “Students Against Sluts Herpes.” The majority of the posts commented negatively on a girl named Shay N. One of the first posts included a sign held by two students displaying the message “Shay Has Herpes.”

Despite Kara Kowalski “push[ing] her computer’s keys in her home,” the Fourth Circuit framed the issue as “where [Kowalski’s] speech occurred when she used the Internet as the medium.” While the court acknowledged Kowalski’s physical actions took place at home, it declined to leave it at that. Instead, the court reasoned Kowalski knew her electronic response would be “published beyond her home and could reasonably be expected to reach the school or impact the school environment.” The Fourth Circuit used Kowalski’s knowledge of the electronic response reaching school grounds as sufficient to meet “on-campus” criteria for the purposes of punishment.

Addressing the issue in 2015 in *Bell v. Itawamba County School Board*, the Fifth Circuit also acknowledges the off-campus/on-campus distinction, but allows punishment of off-campus speech where the student intends for speech to reach the school. In *Bell*, a high-school senior posted a rap recording, which was made off campus using his own equipment, on his public

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90 *Id.* at 567.
91 *Id.*
92 *Id.* at 568.
93 *Id.* at 573.
94 *Id.*
95 *Id.*
96 *Id.*
97 *See* *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015).
Facebook page. The rap alleged misconduct against female students by two school coaches and included vulgar and profane language. One coach heard the rap and reported it to the school-district superintendent. Taylor Bell was suspended based on the language in the rap.

The district court granted summary judgment for the school board, finding Bell’s speech threatening and reasonably foreseeable to cause a disruption. On appeal, a three-judge panel for the Fifth Circuit reversed, concluding that the schoolboard violated Bell’s First Amendment right because the evidence did not support a finding “that Bell’s song either substantially disrupted the school’s work or discipline or that the school officials reasonably could have forecasted such a disruption.” Sitting en banc, the Fifth Circuit vacated the three-judge panel’s decision and found Bell admitted to intentionally directing his rap at the school. That admission allowed the Fifth Circuit to categorize Bell’s speech as on-campus and to apply Tinker. The court found Bell’s lyrics could have caused a disruption and were therefore punishable.

The Eighth Circuit has twice addressed student Internet speech. In both instances, the court asked if the off-campus speech could reach the school community. If it could, the court

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98 Bell, 799 F.3d at 383.
99 Id. at 384.
100 Id. at 385.
101 Id.
102 Id. at 387.
103 Bell v. Itawamba Cnty. Sch. Bd., 774 F.3d 280, 304-05 (5th Cir. 2014).
104 Bell, 799 F.3d at 394.
105 Id. at 398.
applied the reasonably foreseeable disruption standard. In *D.J.M. v. Hannibal Public School District No.60*, a student exchanged instant messages with another student regarding his desire to shoot people.\textsuperscript{107} The court found the student’s speech was not protected by the “true threats” doctrine and the *Tinker* substantial disruption test.\textsuperscript{108} It concluded the speech targeted the school community.\textsuperscript{109} In evaluating the substantial disruption test, the court emphasized the rule from *Tinker*, which states that conduct by a student “in class or out of it,” which may forecast a disruption is not shielded by the First Amendment.\textsuperscript{110}

Similarly, a year later in *S.J.W. v. Lee’s Summit R-7 School District*, the Eighth Circuit found there was an actual disruption in school.\textsuperscript{111} In *S.J.W.*, two brothers created a website using a Dutch domain site which could not be found via a Google search.\textsuperscript{112} They posted sexually explicit and degrading comments about specific female students.\textsuperscript{113} Through word of mouth, the entire school discovered the website.\textsuperscript{114} The Eighth Circuit found a substantial disruption occurred where, among other things, “teachers testified they experienced difficulty managing their classes because students were distracted and in some cases upset” and “local media arrived on campus.”\textsuperscript{115}

\textsuperscript{107} D.J.M. v. Hannibal Pub. Sch. Dist. No.60, 647 F.3d 754, 758 (8th Cir. 2011).

\textsuperscript{108} Hannibal, 647 F.3d at 765.

\textsuperscript{109} Id.

\textsuperscript{110} Id. (emphasis added).

\textsuperscript{111} S.J.W. v. Lee’s Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012).

\textsuperscript{112} Id. at 773-74.

\textsuperscript{113} Id.

\textsuperscript{114} Id at 774.

\textsuperscript{115} Id.
Declining to adopt a specific standard, the Ninth Circuit in 2013 in *Wynar v. Douglas County School District* decided there was a sufficient nexus between the student’s off-campus online speech and the campus itself to conclude disciplinary measures were appropriate.\textsuperscript{116} In *Wynar*, a student posted violent comments regarding guns and killings on his MySpace profile.\textsuperscript{117} His friends notified a football coach at school and the student was suspended.\textsuperscript{118} The court concluded that “when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*.”\textsuperscript{119}

**United States District Court decisions**

Federal district courts have also weighed in on the matter. They have used varying factors to determine when to punish off-campus speech. Interestingly, district court decisions generally have been more student friendly than appellate decisions.

The U.S. District Court for the Southern District of Florida retains the off-campus/on-campus distinction, but allows for punishment of off-campus speech where the speech raises on-campus concerns.\textsuperscript{120} In *Evans v. Bayer*, the court ruled in favor of the student, finding her speech purely off-campus speech.\textsuperscript{121}

High school student Katherine Evans created a group on Facebook for students to voice their opinions about a particular teacher and titled the group “Ms. Sarah Phelps is the worst

\textsuperscript{116} Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1070 (9th Cir. 2013).

\textsuperscript{117} Id. at 1065-66.

\textsuperscript{118} Id.

\textsuperscript{119} Id. at 1069.

\textsuperscript{120} See Evans v. Bayer, 684 F.Supp. 2d 1365, 1365 (S.D. Fla. 2010).

\textsuperscript{121} Id. at 1372.
teacher I’ve ever met.”  

The page included the teacher’s photograph and multiple posts by students voicing opinions about the page and the teacher. The principal became aware of the group after its removal and suspended Evans. In analyzing other circuit court cases relating to Internet speech, the court found Evans’ speech was never brought on to campus and the page was deleted when the principal discovered it. The court found the page did not cause a material and substantial disruption and was not accessed on school grounds; therefore, the speech was off campus and afforded full protections under the First Amendment.

In *T.V. v. Smith-Green Community School Corporation*, a district court in Indiana found that petty disagreements do not rise to the level of a substantial disruption. In *T.V.*, students created provocative photographs of themselves at home. When the school learned of the photographs, it punished the students. The court, assuming without deciding whether *Tinker* applies to off-campus speech, found that no reasonably foreseeable disruption occurred in this case.

Similarly, a district court in California concluded that a phone call from a parent, a student’s refusal to go to class, and five students missing part of class did not rise to the level of

\[122\] Id.
\[123\] Id.
\[124\] Id. at 1367.
\[125\] Id. at 1376.
\[126\] Evans, 684 F.Supp. 2d at 1372.
\[128\] Id. at 772.
\[129\] Id. at 773.
\[130\] Id. at 781.
a substantial or material disruption.\textsuperscript{131} In \textit{J.C. v. Beverly Hills Unified School District}, a student posted a YouTube video that trash-talked a fellow student.\textsuperscript{132} When the school found out, the student was disciplined.\textsuperscript{133} The court concluded “the substantial weight of authority indicates that geographic boundaries generally carry little weight in the student-speech analysis.”\textsuperscript{134} However, because there was not a foreseeable disruption, the speech was protected.\textsuperscript{135}

In \textit{Beussink v. Woodland}, a district court in Missouri concluded a principal punished a student based on a desire to avoid discomfort rather than on a substantial disruption.\textsuperscript{136} In \textit{Buessink}, a student created a vulgar online post of the school’s principal.\textsuperscript{137} Immediately after discovering the post, he disciplined the student.\textsuperscript{138} The court determined the student’s speech was protected and concluded the discipline was based on the fact that the principal was upset.\textsuperscript{139}

A district court in Tennessee in 2013 found speech safeguarded where it was neither targeted at the school nor accessed at school.\textsuperscript{140} In \textit{Nixon v. Hardin County Board of Education}, a student commented on Twitter about another student, including “shoot [K.N.] in the face.”\textsuperscript{141}

\textsuperscript{132} Id. at 1098.
\textsuperscript{133} Id. at 1099.
\textsuperscript{134} Id. at 1104.
\textsuperscript{135} Id. at 1117.
\textsuperscript{136} Beussink v. Woodland R-IV Sch. Dist., 30 F.Supp. 2d 1175, 1180 (E.D. Mo. 1998).
\textsuperscript{137} Id. at 1177.
\textsuperscript{138} Id. at 1180.
\textsuperscript{139} Id.
\textsuperscript{141} Id. at 830.
The student was put in an alternative school for forty five days.\textsuperscript{142} The court, however, said there was no connection to the school other than the fact that the two students attended that school.\textsuperscript{143} There was no disruption, no use of school equipment to create the speech and it was made at home.\textsuperscript{144}

In a case involving the search of a student’s social media account and punishment based on Internet speech, a district court in Minnesota summarized the law of off-campus speech as: “such statements are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment and are so egregious as to pose a serious safety risk or other substantial disruption in that environment.”\textsuperscript{145} In this case, the court determined the statements were not likely to cause a substantial disruption and that the student had a reasonable expectation of privacy to her social media communications.\textsuperscript{146}

\textbf{State Supreme Court decisions}

The Supreme Court of Pennsylvania in 2002 determined that only speech categorized as on campus can be regulated.\textsuperscript{147} In doing so, it established a ‘place of reception’ test to determine when off-campus speech qualifies as on-campus speech.\textsuperscript{148}

\begin{footnotesize}
\textsuperscript{142} Id. at 831.
\textsuperscript{143} Id. at 839.
\textsuperscript{144} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Boucher, 134 F.3d at 821; J.S. v. Bethlehem Area Sch. Dist., 807 A.2d at 847.
\end{footnotesize}
In J.S. v. Bethlehem Area School District, the court found a student’s online website, which was created on a home computer, was on-campus speech because the website was viewed on campus.149 The court used a sufficient nexus test, which ascertains if there is a significant link between the off-campus speech and the school itself.150 If such a link exists, then the speech is considered on campus and the court can regulate it.151

The Supreme Court of Pennsylvania took the analysis one step further and, in finding Tinker, Fraser, and Kuhlmeier inapplicable to the facts at hand, suggested four factors to determine if on-campus speech can be regulated.152 The court suggested looking first at the form of the speech, second at the effect the speech had on the school, third at the setting of the speech (i.e. in a classroom or school assembly) and fourth, whether the speech was part of a school-sponsored expressive activity such as a play.153

Overview

Without a U.S. Supreme Court decision regarding student online speech, lower courts are flailing in murky waters. The courts, with a few exceptions, fall into two different camps. In the first camp are those that distinguish between off-campus and on-campus speech and use certain factors to determine when punishment of off-campus speech is appropriate. The second camp consists of courts that disregard this distinction and base punishment solely on its foreseeable disruption on campus.

149 Id.
150 J.S., 807 A.2d at 667.
151 Id.
152 Id. at 665-66.
153 Id.
The Fourth, Fifth, and Eighth Circuit Courts of Appeal, as well as the Southern District of Florida, Western District of Tennessee, the District of Minnesota and the Supreme Court of Pennsylvania, fall into the first camp. These courts all acknowledge off-campus speech is afforded full First Amendment protections, but when it affects the school environment, it becomes punishable. These courts, however, further split in the factors they use to determine if the off-campus speech is punishable. The Fifth Circuit looks to the intention of the speaker to determine if he or she intended for the speech to reach school grounds. Other courts ask if there is a sufficient nexus between the speech and the school. Courts determine this by examining whether the speech mentions the school, other students or teachers, or if the speech made it onto campus, either by someone physically bringing a printed copy to school or accessing it on campus.

The Second and Third Circuits, as well as the Central District of California, fall squarely in the second camp. The Second and Third Circuits ask merely whether the speech creates a reasonable foreseeably disruption; if it does, the speech is punishable. The Central District of

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155 See Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015).


158 See Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010).
California holds that geographic boundaries do not matter, and it seeks to determine only if the speech could cause a substantial disruption.\(^{159}\)

The Ninth Circuit explicitly declined to adopt a camp, but in evaluating its case, the court asked whether there was a sufficient nexus between the speech and the school.\(^{160}\) In straying from a specific camp, the Northern District of Indiana disregarded the off-campus/on-campus distinction by assuming, without deciding, that *Tinker* applies to off-campus speech.\(^{161}\) These decisions highlight the struggle courts face in determining when to punish off-campus online speech.

**Fourth Amendment**

The Fourth Amendment to the U.S. Constitution protects individuals from unreasonable searches and seizures of their persons and property, and it generally requires a search be conducted only after a warrant is issued based on probable cause.\(^{162}\) The purpose of the Fourth Amendment is to protect intrusions of protected privacy interests.\(^{163}\) In high schools, the Fourth Amendment is less contentious than the First Amendment. However, as digital technology is increasingly used in schools, the likelihood for confusion among the courts rises.

Similar to the First Amendment, courts have concluded the Fourth Amendment applies to students in schools. However, students are not afforded full protection due to the special nature of public schools.\(^{164}\) Courts have found that students are entitled to limited expectations of


\(^{160}\) Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1070 (9th Cir. 2013).


\(^{162}\) U.S. CONST. amend. IV.


privacy when they enter school and bring personal items with them.165 Because schools need flexibility to effectively maintain security and order, searches in public schools are based on reasonableness rather than probable cause.166

In 1985, the U.S. Supreme Court held in New Jersey v. T.L.O. that although educators are government officials, a more lenient standard of reasonable suspicion is sufficient for student searches.167 Calling the ruling “confusing, illogical” and “a serious breach of the Fourth Amendment that will lead to abuse in unreasonable searches and seizures,”168 some members of the public was outraged at the time. Professor Geoffrey Stone opined “the [c]ourt abandoned a bedrock principle of 4th Amendment jurisprudence” with its T.L.O. ruling.169 However, as tragedies continually creep into public schools, the value of student searches is appreciated more today.170

In T.L.O., a teacher saw two students smoking on school property and took the students to the principal’s office.171 The vice principal searched T.L.O.’s purse and found cigarettes.172 When he took out the cigarettes, he saw rolling papers, which he thought indicated marijuana.173 On the

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165 T.L.O., 469 U.S. at 326.
166 Id. at 340.
167 Id.
171 T.L.O., 469 U.S. at 340.
172 Id.
173 Id.
suspicion that T.L.O. had marijuana in her purse, he continued searching and found marijuana in a side pocket.174 The vice principal notified the police, and the state brought delinquency charges against T.L.O.175 The parents sought to suppress the marijuana, claiming the search violated of T.L.O.’s Fourth Amendment rights.176

In assessing how the Fourth Amendment applies to students in schools, the Court created a two-prong test to determine when a search of a student on campus is reasonable.177 The Court noted the test for students in schools requires a relaxed standard of suspicion in order to effectively maintain school order.178

The first prong asks whether the search was justified at its inception.179 If it was, the next question is whether the search “was reasonably related in scope to the circumstances which justified the inference in the first place.”180 In T.L.O., the Court held that the search was justified at its inception based on the suspicion raised by the teacher’s witnessing T.L.O.’s violation of the no smoking school policy.181 Further, the search was reasonably related in scope to the circumstances that initially justified it when the vice principal found rolling papers and continued

174 Id. at 328.
175 Id. at 329.
176 Id.
177 Id.
178 Id.
179 Id. at 341.
180 Id., 469 U.S. at 341–42.
181 Id. at 342.
his search. Therefore, the Court concluded that the marijuana would not be suppressed because T.L.O.’s Fourth Amendment rights had not been violated.

The two-prong test established in *T.L.O.* is consistently used by courts to determine if a search of a student is reasonable. Courts have extended the test to apply to searches of cars on school property, as well as to other property owned by students. A school’s search is unreasonable under the *T.L.O.* factors if it is not based on a reasonable suspicion, extends too far or is overly intrusive in light of the nature of the infraction. Professor James Bernard opines that, the future of *T.L.O.* and cellphones in schools will focus on the second facet, where “the most common charge against school officials will be ascribed to their having gone ‘too far’”

Concluding an educator’s search went “too far,” the court in *T.J. v. Florida* applied the *T.L.O.* factors to a search of a student’s purse and found that the vice principal’s search of a side pocket for a knife did not satisfy the second prong of the *T.L.O.* test. In *T.J.*, the vice principal was notified that a student might possess a knife. In searching the student’s purse, the vice principal removed everything from the purse and did not see a knife. The vice principal

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182 *Id.* at 347.

183 *Id.* at 347-48.

184 See Florida v. D.T.W., 425 So. 2d 1383 (Fla. 1st DCA 1983).


186 *T.J v. Florida*, 538 So. 2d 1320 (Fla. App. 2 Dist. 1989).

187 *Id.* at 1321.

188 *Id.*
noticed a side pocket in the purse, but admitted she did not see any bulges indicating a knife.\textsuperscript{189} Nonetheless, she searched the side pocket and discovered cocaine.\textsuperscript{190}

The court suppressed the cocaine, finding that the search must be related in scope to the reasons for the initial search.\textsuperscript{191} Here, the vice principal had reason to believe she might find a knife in the purse. However, she knew she would not find a knife in the side pocket because a knife could not fit there. Therefore, the search of the side pocket was an unreasonable.\textsuperscript{192}

The first time the U.S. Supreme Court examined another T.L.O. issue was in 2009. In \textit{Safford Unified School District v. Redding},\textsuperscript{193} the Court found a strip search of a 13-year-old girl accused of having Advil was unconstitutional and highly intrusive.\textsuperscript{194} Georgetown Professor Diana Donahoe believes the \textit{Redding} Court “did not go far enough to protect students from school officials’ discretion.”\textsuperscript{195}

In \textit{Redding}, a principal found a student’s planner that contained contraband, including pills.\textsuperscript{196} The principal called the student, Savana Redding, into his office and asked her if the planner was hers.\textsuperscript{197} Redding admitted to owning the planner, but claimed she had loaned it to a

\begin{flushleft}
\textsuperscript{189} \textit{Id.} \\
\textsuperscript{190} \textit{Id.} \\
\textsuperscript{191} \textit{Id.} \\
\textsuperscript{192} \textit{Id.} at 1322. \\
\textsuperscript{194} \textit{Id.} at 378. \\
\textsuperscript{195} Diana R. Donahoe, \textit{Strip Searches of Students: Addressing The Undressing of Children in Schools and Redressing The Fourth Amendment Violations}, 75 \textit{Mo. L. Rev.} 1123, 1150 (2010). \\
\textsuperscript{196} \textit{Redding}, 557 U.S. at 368. \\
\textsuperscript{197} \textit{Id.}
\end{flushleft}
friend and the contraband was not hers. Redding consented to a search of her backpack and outer clothes, but when the principal did not find anything, he asked her to go to the nurse for a more thorough search. The nurse had Redding remove all her clothes except for her bra and underwear. Redding was asked to pull on her bra and underwear, thus exposing her private areas to a certain degree. The nurse did not find anything.

In analyzing the constitutionality of the principal’s search, the Court examined social science evidence to find that the student’s expectation of privacy was indicated “by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure.” Despite the high degree of intrusiveness of the search, the Court in Redding granted the school qualified immunity because, prior to this case, it was not clearly established that such conduct violated the Fourth Amendment. A school official “is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment.”

A recent case applied Redding to a search of a student’s online social media accounts. In September 2015, the Fifth Circuit ruled on a combined First Amendment/Fourth Amendment

\[\text{198 Id.}\]
\[\text{199 Id. at 369.}\]
\[\text{200 Id.}\]
\[\text{201 Id.}\]
\[\text{202 Id. at 375.}\]
\[\text{203 Id. at 378.}\]
case, finding the search unconstitutional. In *Jackson v. Ladner*, two high school girls were engaged in a verbal argument. The argument continued at home via Facebook messaging. One of the girls told her cheerleading coach that the other had threatened and cursed at her. Tommie Hill, the cheerleading coach, demanded the accused’s Facebook username and password and searched her social media. Upon finding messages, Hill suspended the student from the team.

Although the court granted the school qualified immunity, it made clear it was because the behavior occurred prior to the *Redding* decision. The court concluded that “[a]t the time Hill requested and obtained access to M.J’s Facebook messages – in September 2007 – no precedent had held that the Fourth Amendment proscribed Hill’s actions.” In assessing the student’s First Amendment claims, the court focused on whether it was clearly established that punishing a student because of her online speech was unconstitutional. It found that at the time, no case law clearly established a First Amendment right and thus it granted the school qualified immunity.

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207 *Id.* at 82-83.
208 *Id.*
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*
213 *Id.*
214 *Id.* at 88.
215 *Id.*
In the important 2014 Supreme Court case of *Riley v. California*, the Court acknowledged difficulty in applying older laws to new technologies. It stated that the cellphones at issue were “based on technology nearly inconceivable just a few decades ago.” In *Riley*, the Court decided whether the “search incident to arrest” doctrine allowed officers to search cellphones. Finding little resemblance to the physical harms posed by tangible objects such as knives or guns, the Court found officers must secure a warrant before searching a cellphone.

The Court compared a cellphone to a diary, but it concluded the frequency with which people carry cellphones today almost guarantees that officers would be searching personal items regularly.

The Court emphasized the difference between searching physical items, such as a backpack, and a cellphone, stating “the possible intrusion on privacy is not physically limited in the same way when it comes to cellphones.” Frank LoMonte of the Student Press Law Center claims “[t]his is where today’s Supreme Court ruling becomes relevant to schools — it explains that the search of a smartphone is, by its nature, more ‘intrusive’ than the search of a backpack or other physical space.”

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217 Search incident to arrest is a common-law rule that allows police officers to search an arrested person and his or her immediate surroundings without a warrant for weapons and other items that pose a danger to the officers. See *Terry v. Ohio*, 392 U.S. 1, 10 (1968).

218 *Riley*, 134 S. Ct. at 2484.

219 *Id.*

220 *Id.* at 2490.

221 *Id.* at 2489.

These cases highlight the judicial trend of acknowledging the intrusiveness of communication-technology searches. Although it seems clear that searches of digital communication technologies are very different from physical searches, educators often must balance the intrusiveness of the search with the potential harms posed by the alleged misconduct. The next section addresses how lawmakers have attempted to regulate minors’ use of digital communication technologies.

**Lawmakers Responses to Minors use of Technology**

In April 2016, a fourteen-year-old girl from Iowa was accused of “sexting,” and an educator threatened to have her criminally prosecuted for sexual exploitation of a minor and/or child pornography, which would require her to register as a sex offender.  

It began when the girl, called Nancy Doe, sent allegedly provocative photos on the application Snapchat to another student. Doe sent two pictures, one in which she was only wearing underwear and a sports bra and the second in which she appeared in underwear with her hair covering her breasts. Two male students were later discovered printing the pictures using a school computer.

Nancy Doe’s case is not the only example of the devastating consequences of minors’ use of digital communication technologies. In 2012, after coming out to his friends and family as gay, fourteen-year-old Kenneth Weishuhn Jr. was victimized by cyberbullying. Classmates created

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225 *Id.*

226 *Id.*

anti-gay hate groups on social media and allegedly sent Weishuhn death threats via text messaging.\textsuperscript{228} After months of harassment, Weishuhn committed suicide.\textsuperscript{229} The school let the students who were cyberbullying off with a mere warning.\textsuperscript{230}

These examples demonstrate how schools struggle to regulate students’ use of communication technologies. Legislators equally struggle to create laws that balance students’ First and Fourth Amendment rights with their safety and an effective pedagogical environment. Furthermore, technology rapidly evolves, and keeping up with it is extremely difficult. Indeed, the SPLC’s Frank LoMonte contends “legislatures around the country stampeded to outlaw — and at times even criminalize — a vast range of ‘annoying’ or ‘unwelcome’ online speech.”\textsuperscript{231}

With the advancement of social media platforms, students today have constant, unfettered access to each other and to the Internet. This access allows engagement in behavior deemed inappropriate by adults, including “sexting,” “revenge porn” and “cyberbullying.”

As of January 2016, twenty-three states specifically regulate “cyberbullying” and forty-eight more regulate some form of electronic harassment.\textsuperscript{232} Fourteen states have laws regulating off

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Family: Bullies pushed NW Iowa Teen to Take Own Life, KTIV.COM, April 16, 2016, http://www.ktiv.com/story/17473534/family-says.
\item \textsuperscript{231} Frank LoMonte, Court Strikes Down North Carolina’s Unconstitutional “Go to Jail for Social-Media gossip” Law, STUDENT PRESS L. CTR., June 13, 2016, http://www.splc.org/blog/splc/2016/06/north-carolina-cyberbullying-law-unconstitutional; See also Lyrissa Lidsky & Andrea Garcia, How Not to Criminalize Cyberbullying, 77 Mo. L. REV. 693, 725 (2012).
\end{enumerate}
\end{footnotesize}
campus behavior as it relates to bullying.\textsuperscript{233} The latest count on “sexting” laws reports twenty states have specific “sexting” laws and twenty-six states regulate “revenge porn.”\textsuperscript{234}

One problem lawmakers confront is defining these new phenomena.\textsuperscript{235} Although cyberbullying is essentially an extension of bullying, this speech-based conduct seems to be the most difficult to both explicate and regulate. Cyberbullying lacks a clear definition and often is left undefined by lawmakers.\textsuperscript{236} In tackling a cyberbullying definition, many states simply add a technology component to their extant bullying statutes.\textsuperscript{237} This lack of a thorough definition results in both overbroad and vague laws later deemed unconstitutional.\textsuperscript{238}

In criticizing a Colorado cyberbullying bill, UCLA Professor Eugene Volokh notes the difficulty in “clearly defining which distressing speech about minors should be criminal and which shouldn’t.”\textsuperscript{239} Although Volokh acknowledges the serious toll cyberbullying takes on teenagers, he likens the difficulty in defining distressing situations to trying to define which “emotionally cruel romantic breakups (a form of cruelty that has at times also led to suicide) should be criminal.”\textsuperscript{240}

\textsuperscript{233} Id.


\textsuperscript{237} See KAN. STAT. ANN. § 72-8256 (2013).


\textsuperscript{240} Id.
In June 2016, the Supreme Court of North Carolina struck down a 2009 cyberbullying statute, concluding it was overbroad.\textsuperscript{241} The statute made it illegal “for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal or sexual information pertaining to a minor . . . [w]ith the intent to intimidate or torment a minor.”\textsuperscript{242} The court held that while “protecting children from online bullying is a compelling governmental interest,” the statute was not narrowly tailored.\textsuperscript{243} It swept far beyond the state’s legitimate interest, and in leaving the terms “intimidate” and “torment” undefined, the Tar Heel State allowed otherwise protected speech to be criminalized.\textsuperscript{244}

Similarly, in 2014 New York’s highest court struck down a cyberbullying statute for overbreadth and vagueness because the statute criminalized constitutionally protected modes of expression.\textsuperscript{245} In contrast, laws with the highest likelihood of passing constitutional scrutiny tend to keep the First Amendment in mind. Arkansas’s Antibullying Statute, for instance, borrows language from \textit{Tinker}, including in its definition of bullying behavior that “substantial[ly] interfer[es] with a student’s education” or “substantial[ly] disrupt[s] the orderly operation of the school or educational environment.”\textsuperscript{246}

Indeed, University of Florida Professor Lyrissa Lidsky and attorney Andrea Garcia include a First Amendment analysis in their suggested three-step approach for lawmakers to decide when

\begin{footnotes}
\item[241] Bishop, 368 N.C. at 880.
\item[243] Bishop, 368 N.C. at 877.
\item[244] Id. at 878.
\item[245] People v. Marquan, 24 NY 3d 1 (2014).
\end{footnotes}
to properly criminalize cyberbullying. First, Lidsky and Garcia suggest that lawmakers determine the aspects of cyberbullying that are best regulated by criminal laws versus by schools or discipline programs. Second, they suggest that lawmakers identify the different forms cyberbullying can take. Third, they contend that lawmakers should research any First Amendment constraints on criminalizing cyberbullying. Engaging in this three-step process ultimately leaves lawmakers with a narrow definition of criminal cyberbullying that is restricted to only the most serious aspects, such as true threats and fighting words. Such a narrow definition is more likely to be held constitutional.

Another often overlooked problem is regulating speech between students and teachers. Most statutes regulate conduct solely between students. However, Nevada, Florida, and Kansas include cyberbullying of educators. The Silver State’s cyberbullying statute, for example, makes it a crime to cyberbully “a pupil or employee of a school district or charter school.” Florida’s cyberbullying statute gives educators the ability to discipline students who bully or harass “any student or employee of a public K-12 education institution.” Finally, the Jayhawk State’s statute prohibits cyberbullying “by any student, staff member or parent towards a student or by

247 Lidsky, supra note 375, at 725.
248 Id.
249 Id.
250 Id.
251 Id.
253 FLA. STAT. ANN. § 1006.147 (2016).
255 NEV. REV. STAT. § 392.915 (2010).
256 FLA. STAT. ANN. § 1006.147 (2016).
any student, staff member or parent towards a staff member.“257 These particularities may further stifle protected statements of opinion, such as criticism of educators.

Although cyberbullying statutes attempt to punish threatening and harassing statements, sometimes lawmakers take it too far. 258 In 2015, for instance, Illinois passed a cyberbullying law that encouraged educators to search students’ digital communication devices for instances of cyberbullying.259 In a letter from the Triad Community Unit School District in Illinois, the district informed parents that “[s]chool authorities may require a student . . . to provide a password or other related account information in order to gain access to his/her account or profile on social networking website. . .”260 This statute violated students’ privacy and “encouraged schools to pry into students’ personal lives in an intrusive manner.”261 After much backlash, amendments were passed reducing the leeway educators had in requesting usernames and passwords.262 Although Illinois may have gone too far, attorney Michelle Enoch believes Illinois is on the right track because “it can still address cyberbullying in a more specialized manner” than other states.263

Protecting students from cyberbullying is an extremely important interest, yet accomplishing this goal is not easy. Similar to cyberbullying, schools also struggle with safeguarding students


262 Id.

263 Enoch, supra note 402, at 441.
from “sexting.” North Carolina Professor Kimberlianne Podlas claimed just five years ago there is a “teen sexting epidemic.” The term sexting is defined as “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular phones or over the internet.”

In response to the supposed epidemic, numerous states enacted laws making it a crime to send sexually explicit photographs of minors to other minors. Connecticut, for example, makes it a misdemeanor for people between the ages of thirteen and seventeen to possess a sexual visual depiction of someone between the ages of thirteen and fifteen. While this statute makes it a crime to “sext,” it also lessens the criminal consequences of doing so. This shields minors from being charged with more serious crimes intended to punish adults possessing child pornography. However, Professor Podlas asserts that while sexting statutes are preferable to the harsh penalties for child pornography, that “does not make these new sexting-specific laws sound or constitutional.” Rather, she opines that “[i]t only makes them the lesser evil.”

Florida’s sexting statute takes a different approach than most sexting statutes and provides defenses for minors who send or receive ‘sexts.’ Under the Florida statute, a minor does not

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267 CONN. GEN STAT § 53a-196h (2013).

268 Id. at 45.

269 Id.

violate the statute if three conditions are met:

1. The minor did not solicit the photograph or video;
2. The minor took reasonable steps to report the photograph or video to the minor’s legal guardian or to a school or law enforcement official;
3. The minor did not transmit or distribute the photograph or video to a third party.\textsuperscript{271}

Additionally, any minor who transmits to another minor or receives a “sext” for his or her first offense obtains a citation and must appear in juvenile court and/or complete eight hours of community service and pay a $60 fine. In brief, Florida’s sexting statute provides adolescents with a chance to avoid serious consequences and learn from their behavior.\textsuperscript{272}

Closely akin to “sexting” is the phenomenon of revenge porn. Revenge porn is often defined as “the distribution of sexually graphic images of individuals without their consent.”\textsuperscript{273} Most instances of revenge porn between minors arise when one student sexts another and then the recipient shares the image instead of keeping it private. Many states have revenge porn statutes; however, they do not include minor-specific provisions.\textsuperscript{274} The lack of minor-specific provisions is worrisome because adolescents do not rationalize and make decisions like adults.\textsuperscript{275}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Frequently Asked Questions, End Revenge Porn, CYBER CIV. RTS. INITIATIVE, www.endrevengeporn.org/faqs/ [perma.cc/N9VH-2R6H].
\item Mitchell Osterday, Protecting Minors from Themselves: Expanding Revenge Porn Laws to Protect the Most Vulnerable, 49 IND. L. REV. 555, 563 (2016).
\item Valerie Reyna & Frank Farley, Risk and Rationality in Adolescent Decision Making Implications for Theory, Practice and Public Policy, 7 PSYCHOL. SCI. PUB. INT. 1 (2006).
\end{enumerate}
\end{footnotesize}
Consider California’s revenge porn statute. It provides that:

Any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.\(^{276}\)

Rapid changes in technology require lawmakers to scramble to draft laws to protect minors. Cyberbullying, sexting and revenge porn are all areas that lack clear, helpful legislation. Further complicating matters is the fact that minors have unique emotional vulnerabilities. The next part analyzes social science research concerning the vulnerabilities of minors and the effects of specific speech-related crimes on them.

CHAPTER 3
SOCIAL SCIENCE LITERATURE REVIEW

Much research demonstrates that adolescents differ from adults in numerous ways.\(^1\) On a physiological level, teenagers’ brains continue to evolve into their twenties.\(^2\) Some research suggests that brains are still forming even as late as age twenty-four.\(^3\) Cognitively, research shows adolescents are impulsive and take more risks than adults.\(^4\) Due to these physical and cognitive differences, teenagers react differently to stress and victimization.\(^5\) Furthermore, stress and victimization can disrupt brain development, leading to long-term and serious problems.\(^6\)

Understanding adolescent vulnerabilities is important when deciding the proper way to balance their protection and constitutional freedoms. The first section of this chapter analyzes current biological and social science research on adolescent vulnerabilities. Next, the second section examines the interaction between adolescent vulnerabilities and specific crime-related issues. Finally, the third section summarizes the research on adolescent vulnerabilities.


\(^2\) Cauffman, supra note 316, at 751.

\(^3\) Id.

\(^4\) See Thomas Grisso et al., Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants, 27 L. & Hum. Behav. 333 (2003); Haddad, supra note 316.


Adolescent Vulnerabilities

It was recognized centuries ago that adolescents are qualitatively different from adults.\(^7\) In 1899, the first juvenile court in the United States was established in Illinois.\(^8\) Acknowledging differences between minors and adults, the focus of juvenile court was rehabilitation rather than punishment.\(^9\) Today’s society continues to recognize differences between adults and adolescents. In 2006, for instance, Justice Anthony Kennedy cited social science evidence revealing that minors lack maturity and are extremely reckless in holding that juveniles cannot constitutionally be put to death.\(^10\) It is the social science evidence on minors’ vulnerabilities that has largely pushed the legal change we see today.

Subsection one delves into physiological research on adolescent brain formation. Next, subsection two addresses teenagers’ decision making skills, while subsection three discusses adolescents’ ability to think rationally and their tendencies to engage in risky behavior.

Physiological Research

“Adolescence is one of the most dynamic events of human growth and development,” according to researcher Mariam Arain and colleagues.\(^11\) In the past thirty years, technological advancements have made studying the brain easier.\(^12\) Researchers have used such technology to take images and video of the brain as it develops over time.\(^13\) They have found “that the brain

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\(^8\) Id. at 1221; The History of Juvenile Justice, ABA DIVISION FOR PUBLIC EDUC., http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf.
\(^9\) Fox, supra note 323, at 1221.
\(^11\) Arain et al., supra note 317, at 451.
\(^12\) Id. at 449.
\(^13\) See id. at 450 (stating magnetic resonance imaging (MRI) studies have contributed to developments).
remains under construction during adolescence,””¹⁴ and that various parts of the brain are remodeled to “refine connectivity and functionality.””¹⁵

Two major physiological changes occur in the brain during adolescence.¹⁶ First, grey-matter density changes and, second, white-matter density changes and myelinate.¹⁷ White and grey matter are located in places throughout the body.¹⁸ In the brain, grey matter is located throughout the cavity, while white matter is located between the brain and the brainstem.¹⁹ Grey matter is composed of unmyelinated axons – meaning the axons are not covered by myelin.²⁰ Myelin is a fatty protein that forms around nerve cells, creating insulation.²¹ The insulation increases the speed at which impulses circulate in the brain.²² Unlike grey matter, white matter consists mostly of myelinated axons.²³ This is due to the functions of each: information is processed in grey matter, while it is transported throughout the body via white matter.

¹⁴ Id.

¹⁵ Buwalda et al., supra note 321, at 1714.


¹⁹ Id.

²⁰ Blackemore & Suparna, supra note 331, at 296.

²¹ Id.

²² Id.

²³ Id.
Grey and white matter are important for attention, motor skills, cognitive ability and memory development.\textsuperscript{24} Around puberty, grey matter is prominent but its presence begins to decrease rapidly into early adulthood.\textsuperscript{25} Inversely, as grey matter decreases in adolescence, white matter and myelination steadily increase.\textsuperscript{26} When these changes are interrupted, proper development can be impaired, causing cognitive problems.\textsuperscript{27} The next two subsections explore how cognitive changes mirror these physiological changes in adolescents.

**Decision Making Skills**

One of the most important skills a person can possess is making proper decisions. In the legal context, a juveniles’ decision making skills are questioned frequently.\textsuperscript{28} Were they competent to waive Miranda rights or confess? Are they capable of deciding whether to take the stand? Psychological research is extremely important to assess these qualities in juveniles, and specialists often are called in to make these determinations.\textsuperscript{29} Decision making is not a simple construct and researchers break it down into different aspects.\textsuperscript{30} Psychiatry professor Thomas Grisso identifies two concepts factoring into decision making — reasoning and judgment.\textsuperscript{31} He

\textsuperscript{24} Naama Barnea-Goraly et al., *White Matter Development During Childhood and Adolescence: A cross-sectional Diffusion Tensor Imaging Study*, 15 CEREBRAL CORTEX 1848, 1848 (2005).


\textsuperscript{26} Blackemore & Suparna, *supra* note 333, at 298-99.

\textsuperscript{27} Barnea-Goraly et al., *supra* note 340, at 1848.

\textsuperscript{28} Kambam, *supra* note 331.

\textsuperscript{29} See Raphael Leo, *Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians*, 15 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 131 (1999).


\textsuperscript{31} Grisso, *supra* note 320, at 340.
defines reasoning as “cognitive capacities to process information” and judgment as “processes of attaching differential importance to various possible consequences of decisions.”32

As humans grow, their abilities to understand the world improves and thus their assessment of problems becomes more complex.33 In adolescence, teenagers begin to evaluate hypotheticals by weighing the evidence they perceive in terms of credibility and consistency.34 Researchers Bonnie Halpern-Felsher and Elizabeth Cauffman conducted a study in 2001 comparing adolescents’ and adults’ decision-making competency.35 Halpern-Felsher and Cauffman gave each group three hypothetical dilemmas.36 Posed as real problems where participants were peer counseling, participants responded out loud to the problems.37 What Halpern-Felsher and Cauffman found was that adults outperformed adolescents on decision-making competence.38 Adults were able to weigh the risks, long-term consequences and benefits associated with each option better than adolescents.39

32 Id.
34 Id.
36 Id. at 262
37 Id.
38 Id.
39 Id. at 268.
Replicating studies have found similar results. Adolescents are inferior to adults when it comes to their decision-making skills. This is partially because teenagers’ brains are still forming. This physiological limitation affects their cognitive development.

**Rational Thought and Risks**

Entwined with a teenager’s decision making skills is his or her ability to think rationally. “High-risk activities in adolescence – unprotected sex, substance abuse, violence, and other forms of risky behavior – remain a pervasive and costly problem in Western societies. . .” Research shows adolescents often rationalize too much, which leads to engaging in risky behavior. In rational thought, there are two forms of processing, the “fuzzy-trace theory” and the “gist-based” theory. The “fuzzy-trace theory” essentially states that people think intensely about the benefits and the consequences of a decision before making it. The “gist-based” theory, however, posits that people think in terms of what their ‘gut’ tells them to do. Using the “gist-based” model, people do not think through the benefits and consequences and weigh them thoroughly.

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42*Id.*


44*See id.*


46*Id.*
Adolescents tend to use the “fuzzy-trace theory” and adults tend to use the “gist-based” theory more. While weighing benefits and consequences seems like it would lead to more rational behavior, Dr. Jay Giedd of the National Institute of Mental Health explains why it does the opposite. Giedd states the frontal lobes are responsible for weighing incoming messages – such things “like ‘Do this right now’ versus ‘Wait! What about the consequences?’”47 Because teenagers’ frontal lobes are not fully developed, they are unable to properly weigh messages.48 Thus, adolescents weigh benefits and consequences but do so inadequately, leading to impulsive and risky behaviors.49

Adolescent Vulnerabilities Meet the Criminal Justice System

Social science research reveals that adolescents possess unique vulnerabilities that hinder their ability to rationalize and make decisions properly.50 A particularly worrisome behavior now rampant among teenagers is cyberbullying.51 The effects of such behavior, combined with adolescent vulnerabilities, can be devastating.52 Additionally, when adolescent vulnerabilities collide with the criminal justice system, there can be dire consequences on a youth’s future in life. Subsection one discusses the concept of cyberbullying and the effect it has on youths. Subsection two then explores the effects of the criminal justice system on teenagers.


48 Id.

49 Id.

50 See Blakemore, supra note 348; Halpern-Felsher, supra note 350; Reyna, supra note 314.


Cyberbullying and its Effects

Cyberbullying is one of the leading justifications for impinging students’ First Amendment rights in public schools.\(^{53}\) The effects of cyberbullying on adolescents are indeed very serious and sometimes permanent. Teenagers are not equipped to properly handle stressful situations, and cyberbullying is often perceived by youths as incredibly stressful.\(^{54}\) Furthermore, being labeled as a victim of bullying has been shown to affect psychosocial functioning.\(^{55}\) With repeated, targeted and ceaseless bullying, teenagers often struggle to cope.\(^{56}\) Cyberbullying thus can lead to long-term problems such as substance abuse, social anxiety and depression.\(^{57}\) Even more severe, cyberbullying can lead to suicide.\(^{58}\)

In psychology, the term stress represents the effect of anything that threatens “homeostasis” or keeping our internal environment constant.\(^{59}\) Stress generally targets the pre-frontal cortex, where grey matter resides. Stress can be mild or severe and it can dissipate or become chronic. During the teenage years, “severe and chronic stress can interfere with the adolescent neuronal

\(^{53}\) See Bell, 799 F.3d at 394.


\(^{56}\) Sleglova, supra note 369.

\(^{57}\) Bullying and Depression, BULLYING STATISTICS, http://www.bullyingstatistics.org/content/bullying-and-depression.html.


\(^{59}\) Neil Schneidermann, Gail Ironson, & Scott Slegel, Stress and Health: Psychological, Behavioral, and Biological Determinants, 1 ANN. REV. CLINICAL PSYCHOL. 607, (2005).
plasticity that turns the juvenile brain into an adult brain.”60 Thus, stress interferes with the physiological development and, in turn, impacts adolescent cognitive development.

Research shows that bullying is associated with severe mental health problems that can persist into adulthood.61 Cyberbullying is arguably worse than bullying because it is inescapable.62 Professor Jing Wang and colleagues studied four different forms of bullying and found a significantly higher level of depression in adolescents who were cyberbullied.63 Unlike in-real-life-bullying, where teenagers can escape torment once they leave school, teens potentially are constantly bombarded with cyberbullies online. Boston School of Medicine professor Karthik Sivashanker contends that in today’s digital age, people create an “online self” consisting of an individual’s quotes, online pictures, contacts and comments.64 To a teenager, the destruction of their “online self” from cyberbullying is detrimental and leads to depression and suicidal thoughts.65

In contrast, some researchers conclude either that there are no differences between the long-term effects from cyberbullying versus traditional bullying or that traditional bullying is more harmful.66 In fact, a 2015 study found traditional bullying victims experienced more negative

60 Buwalda, supra note 322, at 1714.


63 Jing Wang et al., Cyber and Traditional Bullying: Differential Association with Depression, 48 J. OF ADOLESCENT HEALTH 415, (2008).

64 Karthik Sivashanker, Cyberbullying and the Digital Self, 52 CHILD & ADOLESCENT PSYCHIATRY, 113, 113 (2013).

65 Id.

psychological outcomes than cyberbullying victims.\textsuperscript{67} One problem with distinguishing between bullying and cyberbullying, however, is that much of the conduct satisfies both definitions.\textsuperscript{68}

Suicide is the most drastic consequence of cyberbullying. Recent concern about cyberbullying arises out of several high-profile cases where teenagers who were cyberbullied killed themselves.\textsuperscript{69} Professors Glanluca Gini and Dorothy Espelage researched suicide ideation and suicide attempts as they relate to peer victimization and cyberbullying.\textsuperscript{70} They found that cyberbullying was more strongly related to suicidal ideation than traditional bullying.\textsuperscript{71} Interestingly, cyberbullying seems to be felt more harshly by females. In a 2016 study, researchers found females with a history of cyberbullying reported more suicide ideation than males.\textsuperscript{72}

Another problem adolescents face is how they are perceived by others. The sociological concept of labeling theory posits that how a person views herself and how she behaves may be determined or influenced by a ‘label’ or term used by others to describe or classify her.\textsuperscript{73} In a classic 1973 study, William Chambliss divided high school students who were known for delinquency into two groups.\textsuperscript{74} One group was labeled as ‘saints’ and the other was labeled the

\begin{itemize}
\item \textsuperscript{67} Craig Hase et al., \textit{Impacts of Traditional Bullying and Cyberbullying on the Mental Health of Middle School and High School Students}, 52 PSYCHOL. SCHOOLS 607, 614 (2015).
\item \textsuperscript{68} Id. at 613.
\item \textsuperscript{69} The Top Six Unforgettable CyberBullying Cases Ever, NOBULLYING.COM, Oct. 19, 2016, https://nobullying.com/six-unforgettable-cyber-bullying-cases/.
\item \textsuperscript{70} Glanluca Gini, & Dorothy Espelage, \textit{Peer Victimization, Cyberbullying, and Suicide Risk in Children and Adolescents}, 312 CLINICAL REV. & EDUC. 545, 546 (2014).
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Copeland, \textit{supra} note 376 at 421.
\item \textsuperscript{73} William Chambliss, \textit{The Saints and the Roughnecks}, https://www.d.umn.edu/~bmork/2306/readings/chambliss.w99.htm.
\item \textsuperscript{74} Id.
\end{itemize}
‘roughnecks.’\textsuperscript{75} The ‘saints’ consisted of boys from middle-class households and the ‘roughnecks’ consisted of boys from lower-class households.\textsuperscript{76} Chambliss labeled the ‘roughnecks’ as deviants.\textsuperscript{77} Although both groups engaged in similar delinquent behavior, law enforcement took legal action more often when dealing with the ‘roughnecks’ than with the ‘saints.’\textsuperscript{78} Chambliss attributed the differences between the groups to the reputation – the label – of the groups.\textsuperscript{79}

In 2015, Jill Sharkey and her colleagues used labeling theory to test the psychosocial functioning of bullied minors who either adopted or denied the bully-victim label.\textsuperscript{80} They observed that students who labeled themselves as victims of bullying had poorer psychosocial functioning than peers who rejected the victim label.\textsuperscript{81}

More generally, in examining the labels “victim” and “survivor” of landmine-injured individuals, researcher Melanie Reimer asserted that “an individual’s perception of self as a victim versus a survivor may have significant implications on their potential to reintegrate and become a productive member of society.”\textsuperscript{82} She continued by finding that individuals who

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} See Jill Sharkey et al., Psychosocial Functioning of Bullied Youth Who Adopt Versus Deny the Bully-Victim Label, 30 SCHOOL PSYCHOL. Q. 91 (2015).
\textsuperscript{81} Id. at 100.
labeled themselves survivors were more likely to take action and move forward, whereas those who labeled themselves victims sought out sympathy, which hindered their ability to recover.\textsuperscript{83}

Cyberbullying is troublesome, both for the bullies and for the victims. The psychological effects cyberbullying has on adolescent minds can lead to deadly consequences. Furthermore, being labeled as a victim of cyberbullying can add to the deleterious effects of the actual bullying.

**Criminal Justice System Stigma and Effects**

While cyberbullying has negative effects on adolescents, equally worrisome are the effects the criminal justice system has on minors. Studies report that juveniles who interact with the criminal justice system, at any level, are more likely to have future interactions with it.\textsuperscript{84} Females in particular, are significantly harmed more by deviant labels than males.\textsuperscript{85} Psychology professor Andrew McGrath observed that adolescent women who had contact with the criminal justice system and who felt stigmatized were more likely to reoffend.\textsuperscript{86}

In a 2014 study, researchers found support for labeling theory where minors who were arrested were more likely to engage in future offending behavior.\textsuperscript{87} Urban Institute researcher Dr. Liberman and colleagues matched juveniles together who had equivalent offending behaviors and patterns.\textsuperscript{88} Controlling for other variables, the difference between the matched juveniles was

\begin{footnotes}
\begin{enumerate}
\item \textsuperscript{83} Id.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} McGrath, supra note 399 at 898.
\item \textsuperscript{88} Id. at 353.
\end{enumerate}
\end{footnotes}
that one juvenile had been arrested while the other had not. The results showed that despite matching offending behaviors and patterns, the matched juveniles who were arrested were more likely to reoffend. Liberman posits this is due to the effects of the societal response to being labeled as an ‘arrestee’ or ‘delinquent.’ Other researchers have found similar results.

Employment prospects are also damaged by interactions with the criminal justice system. Researchers Scott Davies and Julian Tanner conducted a study using 5,850 responses from the National Longitudinal Survey of Youth to determine if contact with school and justice system authorities had effects on future employment. Unsurprisingly, Davies and Tanner found that incarceration had the strongest effect on future employment. They also found, however, that more milder forms of contact with authorities affected future employment. Particularly relevant, Davies and Tanner discovered that for girls, being suspended or expelled from school had a strong, negative impact on later job outcomes.

Sexting violations pose potential problems for adolescents’ futures. Teenagers who engage in sexting, but who live in states without specific sexting laws, may be convicted of child

89 Id.
90 Id. at 364.
91 Id.
93 Davies, supra note 399, at 398-99.
94 Id. at 391.
95 Id. at 399.
96 Id. at 400.
97 Id.
pornography.98 Child pornography convictions, in turn, require the individual to register on the sex-offender list.99 Teenagers will typically be a registered sex offender for the rest of their lives.100 Such registration dictates where people can live,101 how they can celebrate certain holidays,102 and what employment opportunities they can have.103 This has devastating consequences for a teenager whose crime was merely taking or receiving nude photographs of themselves or a fellow classmate – a practice which is not a crime for adults. Indeed, University of Central Florida Assistant Professor Robert Wood noted that "the zero tolerance approach to teenage sexuality as expressed through sexting has had dreadful consequences for those students unfortunate enough to get caught."104 Labels, whether it be an association with the criminal justice system or as a sex offender have detrimental psychological and physical ramifications.

Conclusion

Science demonstrates that teenagers and adults are different. Adolescents’ brains are still forming, which affects their decision making. Specifically, minors feel the effects of labels and


99 See 18 U.S.C. § 3583(d); USSG §5D1.3(a)(7).

100 Id.


cyberbullying more than adults do. These vulnerabilities justify treating minors differently than adults. The next chapter analyzes the current First and Fourth Amendment tests in high schools and proposes new criteria to protect adolescents from their own vulnerabilities and to safeguard their First and Fourth Amendment rights.
CHAPTER 4
THE DIGITAL-COMMUNICATION TEST – A FIRST AND FOURTH AMENDMENT STANDARD

While social science research illustrates why adolescents deserve different treatment from adults, it does not justify using legal tests that deliver inconsistent results and afford educators enormous discretion. The current First and Fourth Amendment tests used for public school incidents fail to adequately address situations involving digital messages. Critics remark that “[t]he vague and unpredictable standards currently applied in online student speech cases do not give students any guidance on when their expression is beyond the school’s reach.”\(^1\) This is, in part, because the First Amendment standard, based off Tinker, is in shambles, with different jurisdictions applying altered versions of the test. Furthermore, the Fourth Amendment test from T.L.O. faces shortcomings in properly valuing digital communication devices and information.

**Problems with the First Amendment Test**

Several problems plague the First Amendment standard used in public schools. First, courts are not using a unified test. Although all courts require a finding that the speech interferes with or is likely to interfere with the school environment for it to be permissibly punished, that seems to be the only consistent consideration.\(^2\) Some courts include a geographic component under which the speech must have occurred on school grounds.\(^3\) Other courts inquire about the intent of the student who composed the speech.\(^4\) Without a unified test, speech that is constitutionally

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1 Harriet Hoder, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students’ Online Activity*, 50 B.C. L. REV. 1563, 1600 (2009).


4 See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015).
protected in one state may be found unconstitutional in another. Moreover, often schools can punish what may be constitutionally protected speech merely because, under the doctrine of qualified immunity, they “have a compelling argument that no ‘clearly established’ law existed to guide their policy.”\footnote{Hoder, supra note 421 at 1568.} In a nation that prides itself on equality, this inequity creates the opposite.\footnote{See Ruth Bader Ginsburg, When Will There be Enough Women on the Supreme Court? Justice Ginsburg Answers that Question, NEWSHOURS SHARES, Feb. 5, 2015 (saying “‘[W]hen I’m sometimes asked when will there be about [women on the Supreme Court]? And I say ‘When there are nine.’ People are shocked. But there’d been nine men and nobody’s ever raised a question about that.’”); Justice Sonia Sotomayor “until we get equality in education, we won’t have an equal society” as quoted in Julia Passamani, Call for Education Equality.}

A second problem – one that contributes to the first – is that despite a common principle among the tests (that the speech is causing or will cause a substantial disruption) that concept is ill-defined. What precisely constitutes a substantial disruption is frequently left to educators to decide, and courts habitually defer to educators, finding them to be in the best position to understand the needs of the school environment.\footnote{See, e.g., Hazelwood, 484 U.S. at 273; Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist., 682 F.2d 858 (9th Cir. 1982); Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981); Frasca v. Andrews, 463 F.Supp. 1043 (E.D.N.Y. 1979).} With such enormous amounts of discretion often unchecked, the possibility for abuse of power is high.

Both problems with the First Amendment test may chill constitutionally protected speech. With inconsistent results, due to ill-defined concepts and varying speech tests, students may resort to silence rather than speech for fear of punishment. The irony here is that schools are places that should foster free speech and teach students about their constitutional rights. Ill-defined concepts, inconsistent speech tests and chilled speech are three main reasons why the Tinker-based First Amendment test in public schools fails as it currently stands. A test with more consistency and fairer results is needed.
Problems with the Fourth Amendment Test

Compared to the First Amendment test, the Fourth Amendment standard in public schools fairs slightly better in protecting students and their constitutional rights. The Fourth Amendment test from *T.L.O.* requires educators to have a reasonable suspicion of misconduct or unlawfulness, and the subsequent search must be limited in scope to its original purpose.\(^8\) Prior to digital communication devices, this standard applied solely to tangible items. Commonly, Fourth Amendment searches in public schools consisted of searching for drugs, drug paraphernalia or weapons.\(^9\) As applied to tangible items today, the *T.L.O.* test still has merit. Unfortunately, as applied to searches of digital communication devices, it fails to adequately balance students’ constitutional rights and their safety.

The Court in *T.L.O.* justified a lower Fourth Amendment standard in public schools to “strike the balance between the schoolchild’s legitimate expectations of privacy and the school’s equally legitimate need to maintain an environment in which learning can take place.”\(^10\) However, technology creates problems with the *T.L.O.* standard, posing complications not originally envisioned. First, searching digital communication devices yields information rather than tangible property. The dangers posed by tangible items like knives and drugs are certainly clear, but the dangers arising from information are much murkier.

For example, in searching for drugs or weapons educators hope to confiscate tangible items that could be used to cause physical harm. Information, however, does not work in the same

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\(^8\) *T.L.O.* at 347.

\(^9\) See D.G. v. State, 961 So. 2d 1063, 1064 ( Fla. 3d DCA 2007); T.J. v. State, 538 So. 2d 1320, 1321 (Fla. 2d DCA 1989).

\(^10\) *T.L.O.* at 340.
manner. First, it is “straight-up hard to ‘completely’ delete data . . .” from the Internet.\textsuperscript{11} Second, even if deleted from one device or application, it may be stored in another place, such as with messaging applications. The Supreme Court recognized that “digital data stored on a cell phone cannot itself be used as a weapon . . .”\textsuperscript{12} Thus, the once “sure-to-eliminate-the-danger” response is no longer a certainty with information found on digital communication devices.

Another problem not previously envisioned by the courts is the privacy implications associated with digital communication devices. Only recently have courts begun to recognize the “additional intrusion on privacy. . .” of digital communication device searches.\textsuperscript{13} Cellphones, Facebook profiles, text messages and emails are all common applications used by teenagers and adults alike. These applications, quantitatively, hold an enormous amount of information. Cellphone capacities, for example, have up to 256 gigabytes of storage, which is more than some brand-new laptops.\textsuperscript{14} Furthermore, all this data is conveniently stored in one location which, in the aggregate, can reveal highly personal information. For instance, an Internet search history for symptoms, plus multiple visits to WebMD, reveals more personal information than if only one of those pieces of information was known.\textsuperscript{15}

The public-school context is where the First and Fourth Amendments collide. When educators learn of potentially dangerous information supposedly located on a personal digital


\textsuperscript{12} Riley, 134 S.Ct. at 2485.

\textsuperscript{13} \textit{Id}. at 2488-89.


\textsuperscript{15} See Riley, 134 S.Ct. at 2490.
communication device, when can they search the device and what can they do when they find the information – the speech? With this scenario occurring frequently, a test that combines the First and Fourth Amendment and provides more consistent results is needed.

The Digital-Communication Test – Combined First and Fourth Amendment Test

The digital-communication test proposed in this thesis is derived from: 1) scholarly refinement of the First Amendment Tinker test offered by Samantha Levin; 2) Title IX of the Education Amendments of 1972; and 3) the T.L.O. Fourth Amendment test. In borrowing and melding principles from these three sources, a unified test resulting in greater consistency develops.

Fordham University law student Samantha Levin concludes that judicial attempts to address whether schools reasonably forecasted a substantial disruption “lack any sense of uniformity.”\textsuperscript{16} In response, she proposes using esteemed Judge Learned Hand’s Carroll Towing Co. formula to assess substantial disruption.\textsuperscript{17} In United States v. Carroll Towing Co., a barge drifted away from a pier and damaged other boats.\textsuperscript{18} Judge Hand proposed a formula for deciding if the barge owners breached a duty of care – commonly known as the B<PL formula.\textsuperscript{19} He wrote that if the burden of taking precautions (B) is lower than the probability of loss (P) multiplied by the gravity of the loss (L) then the owners breached a duty of care.\textsuperscript{20} Four years later, the Supreme Court in Dennis v. United States applied the B<PL formula to a First Amendment case, defining

\textsuperscript{16} Levin, \textit{supra} note 14 at 870.

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} United States v. Carroll Towing Co, 159 F.2d 169, 170-71 (2d Cir. 1947).

\textsuperscript{19} \textit{Id.} at 173.

\textsuperscript{20} \textit{Id.}
the test as whether “the gravity of the ‘evil’, discounted by its improbability, justified such invasion of free speech as is necessary to avoid the danger.”21

Levin follows the Dennis Court’s logic to determine if a forecast of substantial disruption is reasonable. Her test requires a court to determine the potential harm of the disruption (L) and the likelihood of the disruption occurring (P).22 According to Levin, what results is a balancing test where only if the potential harm is great and the likelihood of it occurring is high will a forecast for a substantial disruption be justified.23 She offers the example of a student who posts on Facebook that he is going to kill everyone in his school.24 Levin argues that the harm posed by this speech is great but the probability of it occurring is low and thus a forecast of a substantial disruption is not justified.25 While she acknowledges this result may seem outrageous, she argues her refinement serves as the necessary “judicial check on the school’s ability to infringe a student’s First Amendment right,” and protects against any chilling effect.26

Given the often unfettered discretion afforded to educators, such a test would provide a desired safeguard. The digital-communication test offered in this thesis takes Levin’s refinement further. Borrowing from Title IX of the Education Amendments of 1972, which protects students from student-on-student sexual harassment, the digital-communication test considers whether the


22 Levin supra note 14 at 891.

23 See id. at 891-93.

24 Id at 892.

25 Id.

26 Id.
speech was either severe or pervasive in order to decide if the potential harm (L) is great. For the digital-communication test, severity of speech is determined by factors such as the platform used (Facebook, Snapchat, text message application), the media format (video, public post, private message), and the meaning of the message evaluated from a reasonable student standard, the magnitude of the harm and the specificity of the speech. The meaning of the message has the most influence on severity. Pervasiveness of the speech evaluates the number of times the alleged attacker engaged in the same or similar speech. For example, if the speech was severe, such as a death threat, or pervasive, such as continuous taunts, then the potential harm (L) is great.

It is important to note that there are two types of harms posed by speech – tangible harms and intangible dignitary harms. Tangible harms pose physical threats, such as “I’m going to stab you.” Intangible harms, often called dignitary harms in tort law, refer to “injuries to our dignitary at the core of our being.” Such harms elicit feelings of being “humiliated, excluded, dismissed, treated unfairly, or belittled.” And while physical harms may appear more severe, “[n]euroscientists have found that a psychological injury such as being excluded stimulates the same part of the brain as a physical wound.” This means that educators should give equal weight to tangible and intangible harms posed by speech.

The distinction between harms, however, provides educators with guidance on when police intervention is allowed. Instances of dignitary harms do not warrant police intervention.

27 Title IX provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. §1681(a) (2012).


29 HICKS, supra note 448, at 19.
However, if schools determine a tangible harm posed by speech is severe enough, they may elicit police help. An example of this would be if a student threatened to shoot a particular person. Educators are not trained like police officers in disengaging hostile persons and protecting victims. Thus, if a school official feels ill-equipped to handle a scenario where physical harms are threatened, police may intervene.

Evaluating meaning message will require using a reasonable student standard. As attorney Harry Shulman noted in evaluating child negligence standards, for society to hold children to the same degree of care as adults “would be to shut its eyes, ostrich-like, to the facts of life and to burden unduly the child’s growth to majority.”30 Society recognizes that minors lack adult qualities. For example, age requirements for operating motor vehicles reflect societal recognition that youths possess a lower standard of awareness and judgement compared to adults. Further, social science evidence illustrates that decision-making skills are less developed than adults.31

Perhaps the most developed area of law exhibiting this philosophy is tort law. The 1965 restatement of torts requires child actors to be compared to “reasonable person[s] of like age, intelligence, and experience under like circumstances.”32 Specifically, the comments note that the special standard for children “arises out of the public interest in their welfare and protection. . .”33 Such recognition, however, is not limited to civil law. Indeed, in 2011, the Supreme Court recognized a reasonable child standard in deciding if age should be included in the Miranda custody analysis.34 In that case, Justice Sonia Sotomayor wrote “a reasonable child

30 Harry Shulman, Standard of Care Required of Children, 37 YALE L. J. 618, 618 (1928).
31 See Grisso, supra note 44; Kambam, supra note 56.
32 Restatement (Second) of Torts § 283 (1965).
33 Id. at cmt. b.
subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.\textsuperscript{35}

While message meaning can be interpreted by people of any age, the differences between adults and children require the meaning message to be determined by a reasonable student rather than a reasonable person. Minors view the world differently than adults do. What a message means to an adult may be completely different than what it means to an adolescent. Thus, the digital-communications test evaluates message meaning by using a reasonable student standard. The question is what message meaning would an ordinary student of similar age, intelligence and experience deduce.

In \textit{Morse}, the Court acknowledged Principal Morse and the superintendent interpreted the message “Bong Hits 4 Jesus” to refer to illegal drug use.\textsuperscript{36} However, the Court also noted that the student who wrote the speech intended it to be funny and meaningless, rather than having a different meaning.\textsuperscript{37} The key difference in \textit{Morse} is that the student did not use speech to mean something distinct from an adult’s interpretation.\textsuperscript{38} Had the student offered an alternative meaning to the speech, that interpretation would most likely have been used rather than the adult’s interpretation. Thus, where speech can be construed to have two different meanings – one from an adult perspective and one from a student perspective – the student interpretation should be used.

Important to note is the digital-communications test uses a reasonable student standard rather than a reasonable juvenile standard. This reflects the notion that under the law, an

\textsuperscript{35}\textit{Id.} at 2403.

\textsuperscript{36} \textit{Morse}, 551 U.S. at 398-99.

\textsuperscript{37} \textit{Id.} at 402.

\textsuperscript{38} \textit{Id.}
eighteen-year-old will not be considered a juvenile. In public schools, however, it is common for high school seniors to be eighteen. An eighteen-year-old in public high school should be compared to similar eighteen-year-old students in high school rather than be subjected to an adult standard.

Similarly, students who are older than eighteen yet who also remain in public compulsory schools should be treated equivalent to that of a similarly situated reasonable student. There are various reasons why students do not graduate at age eighteen, including mental maturity, social maturity or academic progress. These reasons establish that the adult-aged student has mental capacities as that of their fellow student-aged peers. Thus, treating them as adults rather than students would be holding them to an unfair standard.

Furthermore, students at alternative schools should not be treated differently under the proposed digital-communications test. Although students who are sent to alternative schools – such as those for students with disciplinary problems – are characteristically different than students in regular public schools, the proposed digital-communication test allows for educator discretion to evaluate the situation. If an educator is faced with speech made by a student at an alternative school, the educator may use that fact to find an increased likelihood of harm occurring from the speech.

Another severity factor is the magnitude of the speech. Magnitude of the speech is measured by how many people are targeted by the speech. For example, a bomb threat or a shooting of the entire school threatens harm to a large number of people. More than eight people targeted, not merely affected, by the speech qualifies as a large number of people. The number of people targeted, rather than the number affected by the speech, is measured because many people,

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including educators, police, and parents, might be affected by speech regardless of how severe it is. Thus, magnitude of those targeted by the speech should be determined. Magnitude of the harm is another factor to consider but it is not determinative. If someone said “everyone in the marching band is stupid,” the magnitude of the speech is high. More than eight people are the target of this speech. However, the meaning of the message is not severe and thus punishment based on that speech would not be justified.

The number eight was chosen because research finds that the average number of friends in a group is slightly over seven. Students who are victimized by a specific group might retaliate with speech aimed at that group. Such speech should not be classified as severe merely because it targets a group of friends. Thus, for the magnitude to be large enough to increase severity on that fact alone, it must be distinct from more common instances of speech which target specific groups of friends. Thus, if speech targets more than eight individuals the magnitude of the speech is high and can increase severity.

Finally, specificity of the speech increases its severity. For example, the speech “I’m going to hurt Carl” is less specific than “I’m going to take the bat from my dad’s baseball bag and bring it to school tomorrow and hit Carl with it at lunch.” Someone who voices a specific message has thought more about it and this increases the likelihood that the potential harm will occur. Thus, the more specific speech is, the more severe the speech is.

Although the Internet itself can make speech seem pervasive, the mere fact a message is posted on the Internet is not sufficient to make it pervasive under this test. Additionally, the time an educator takes to search for speech or read it is not evidence of a disruption. While this standard does not require an intent to commit harm by the sender, such a showing increases the

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40 Kathryn R. Wentzel & Kathryn Caldwell, Friendships, Peer Acceptance, and Group Membership: Relations to Academic Achievement in Middle School, 68 CHILD DEV. 1198, 1203 (1997).
severity of the speech. Intent can be inferred by the severity or pervasiveness factors. For example, speech about a fellow student that is posted to a forum where hundreds of classmates can see it is more severe than the same speech posted to a forum where hundreds of non-classmates see it. While it is more likely that a student speaking about a peer will have an audience consisting of classmates, there are a variety of platforms that a student can choose which would not reach classmates. Thus, intent to cause harm can be inferred where a student made the choice to have his speech heard by classmates.

Furthermore, by incorporating the T.L.O. test, educators may not search digital communication technologies for speech unless both the potential harm from the alleged speech is high (L) and the probability of it occurring is high (P). If this heightened burden is met, then an educator is permitted to search as long as it is reasonably related to the reason for the search in the first place – the second prong of the T.L.O. test.

For example, if an educator receives a tip that a student called another student “an awful person” in a comment on Facebook the prior evening, the educator would only be able to search the digital communication devices of that student if the educator believes the alleged speech is sufficiently severe or pervasive to cause great harm AND that the occurrence of such great harm is likely. The speech may be mean, but it is not severe because it was made in a Facebook comment and said only once. Using the digital-communication test, the potential harm would not be severe or pervasive enough to justify a search or punishment. Had the educator done so, In its entirety, the digital-communication test offered in this thesis works as follows:
1. Is the harm posed by the alleged speech severe (platform, media format, meaning) or pervasive (# of times repeated speech)?
   a) No → No search and no punishment
   b) Yes: → (prong 2)

2. (2) What is the actual likelihood of disruption
   a) Low → No search and no punishment
   b) High → Can search digital communications* & punish based on speech
       *The search must be reasonably related in scope to the circumstances which led to the initial search.

The proposed test eliminates or significantly minimizes flaws that plague the current First and Fourth Amendment standards. First, it creates a unified test that schools and courts can follow across the nation. This eliminates the inconsistent nature of the First Amendment tests currently used. A common problem with the current First Amendment Tinker standards is how to handle the geographic nature of the Internet and speech. The digital-communication test eliminates the need to make that determination. Instead, this test focuses on the speech itself and its likelihood to cause harm, which includes cyberbullying instances that occur off campus.

Second, the digital-communication test addresses the ill-defined concept of substantial disruption. For speech to cause a substantial disruption, educators now must assess clear concepts and weigh the severity or pervasiveness of those concepts rather than use pure discretion.

Third, this test limits, while not eradicating, educators’ discretion. The Supreme Court defers to educators’ judgment because educators better understand the school environment. However, to ensure they do not have unbridled discretion, this test affords them discretion in two respects. First, educators will have discretion at the outset of the test when it is a close call⁴¹ as to whether

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⁴¹Close call is used here to mean a set of facts that do not clearly or easily lead to a conclusion. Instead, the facts could lead one reasonable person to a certain conclusion and a different reasonable person to another. An example of a close call would be where a baseball umpire calls a player safe at first base. The first baseman must catch the ball in his glove before the running player steps on first base. A close call would be where the player steps on first base at almost the exact time as the first baseman catches the ball. The umpire assesses all the facts including what he
speech is severe or pervasive. This limits their discretion to close calls because school officials cannot as easily cover-up abuses of power. Society knows and understands the general meanings of severity and pervasiveness and thus it would be difficult for a court to allow educators – in keeping with deference – to punish speech that is clearly not severe or pervasive. This, in turn, deters educators from abusing their power.

The second instance where educators can use their discretion is after they determine the speech is severe or pervasive. The next step in the analysis asks whether the speech is likely to cause a disruption or harm. This requires educators to examine the totality of circumstances to decide if the likelihood of harm is great. In doing so, it requires educators to use their knowledge of how the school environment operates to decide if a harm is feasible. While educators may still abuse their power here, it is limited to only scenarios that are initially found to be severe or pervasive and thus the value of proper discretion is saved.

For instance, consider two students who say online “I’m going to shoot everyone at school.” Student one has a poor disciplinary record and has been involved in violent incidents at school. Student two, however, has never been involved in a violent altercation, and teachers say the student has been acting normal. With this information, school administrators can use their discretion to determine the probability of the harm occurring. Ideally, they would find the probability of harm is greater and arguably high when student one said it versus student two.

Finally, this test incorporates a Fourth Amendment component that provides a method to balance the heightened expectations of privacy people hold with digital communication devices and student safety. The severe or pervasive nature of the speech component provides the

saw, his previous experiences and what he knows about the sport to conclude that the player is safe. However, the catch and step were so proximate in time that a different umpire in the same exact position might have called the player out. The scenario is so close, that either conclusion is plausible.
heightened standard school officials must surmount to lawfully invade privacy – consistent with the Supreme Court’s *Safford* reasoning.

The proposed digital-communications test is favored over leaving off-campus speech with full First Amendment protection and searches of digital communication devices to probable cause standards for three reasons. First, courts currently struggle to find the line between off and on-campus speech. Without a clear line, it is impossible to have consistent applications. A second reason for the proposed test is that it affords educators the opportunity to take advantage of the “teachable moment.” As the majority stated in *Bethel v. Fraser*, society has an interest “in teaching students the boundaries of socially appropriate behavior.” Affording students lower constitutional protections allows educators to capture the teachable moment.

For example, consider if students are using their cellphones improperly but not illegally, such as during class. Educators would not be able to capture the improper behavior and teach students acceptable behavior as often because the probable cause burden would be too high. A third complication is that educators would need to be trained in probable cause standards similar to police officers. Police officers go through extensive training programs and attend police academy to learn about probable cause and how to spot it. Such a training requirement for teachers would not be feasible. Examining several hypothetical scenarios below illustrates that the test produces fair and consistent results.

**Scenario One:** Mike tells his principal that John has sent him three messages in the past seven days on Facebook Messenger. The messages say John is going to kill Mike with John’s

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42 *Ross*, *supra* note 149, at 9.

43 *Bethel*, 478 U.S. at 681.

44 See *Training/Academy Life*, DISCOVERPOLICING, http://discoverpolicing.org/what_does_take/?fa=training_academy_life (describing training and academy requirements throughout the nation).
dads’ gun. First consider if the harm posed by the alleged speech severe or pervasive. The same or similar speech has occurred three times over the past seven days. Three times in one week is more than a mere thoughtless statement. Three times in seven day shows intent for the message to be perceived and to keep the message fresh in the recipient’s mind. The shorter the time period between messages, the clearer is the intent to harass the recipient. Additionally, three times in one week makes the message more pervasive. Although a person saying hello three times a week is also likely to be pervasive, the message “hello” would fail to allow punishment under the next prong.

In this scenario, John sent the message through Facebook Messenger. A Facebook message demonstrates a deliberate intent by John to target Mike. To send a Facebook message, a sender must select the recipient and open a dialogue box. The sender then must type their message and press enter or send. However, a Facebook message is less severe than a Facebook post where the subject of the speech is “tagged”45 or easily identifiable. A message reaches only the one person whereas a Facebook post reaches multiple people and has the potential to cause a great deal of harm.

The message John sent to Mike threatens a life. Taking a life is one of the most severe messages that can be sent. Specifically, in this scenario John threatened that he would take Mike’s life and provided specific details on how he would do so. Due to these circumstances, the speech is both pervasive and severe. The answer to the first prong is thus yes. The next question is: What is the actual likelihood of disruption? This is the second instance where school officials can use their judgment. Questions that should be asked include whether John has a

45 “Tagged” refers to a feature on Facebook where a person can create a link to another person’s profile in a message or picture. When a person “tags” another profile, that profile is notified. Additionally, people who see the post can click on the “tagged” person’s name and are directed to that profile. What is Tagging and How Does it Work? FACEBOOK, HTTPS://WWW.FACEBOOK.COM/HELP/124970597582337.
father figure; if John’s father owns guns; if John previously has been in violent altercations at school. If these questions all are answered in the affirmative then it is probable that John’s speech will cause harm. Thus, an educator could permissibly search John’s digital communication device for these specific communications and punish John based on that speech.

Since educators are familiar with the school environment, they should be able to validly assess danger. Teachers, who see students daily over the course of a year if not longer, form relationships with their students. 46 They come to know them on a personal level. 47 Upon hearing of a potentially dangerous or harmful situation, teachers can rely on their relationship with a student to provide insight on the probability of the harm posed by speech.

**Scenario Two:** We alter the facts from Scenario One to where Mike tells the principal that John posted one time, one week ago on a Facebook post, that he is going to kill the entire school. First ask: Is the harm posed by the alleged speech severe or pervasive? The speech was posted only once one week ago, thus it is not pervasive. Speech uttered only once is never pervasive. It could, however, be severe because the message itself threatens lives. The first issue on the severity scale is the meaning of the message. In this case, the message is one of the most severe messages – a death threat. The next question is: What is the actual likelihood of disruption? In evaluating this scenario, the probability of disruption is low. Why? Because the speech was posted one time a week ago, and killing the entire school population is not probable. Here questions asked include: how probable is it for someone to kill the entire school? Has John posted on more than one occasion his intention to kill the entire school? The answers to these questions are no. If, however, the answers were yes, a school could use its discretion to find the


47 *Id.* at 56-57.
probability of harm high and thus search John’s digital communication devices and punish him for the speech.

**Scenario Three:** Carly has been crying in the bathroom at school all day because Shelly posted a picture on Instagram the night before of Carly in an ugly sweater. First ask: is the harm posed by the alleged speech severe or pervasive? The speech was a single picture posted once on Instagram. The message was posted only once and thus it is not pervasive. To determine if the speech is severe, factors such as the meaning of the message, the inferred or explicit intent of the speaker, where the post was made, and the media format should be assessed. Here, Shelly merely posted a picture of Carly in an ugly sweater; she did not write an accompanying post. This is evidence of a mild message. Even had Shelly captioned the photo with a message describing Carly in an ugly sweater, it would still be mild. Had Shelly, however, captioned the photograph with a more serious and harmful message, such as “you should burn in that sweater,” then the post would be considered more severe. Had the photograph Shelly posted consisted of graphic images portraying serious harm or death then the message also would be more severe. The meaning of the message has the most influence on the determination of severity, so it is unlikely that any other factor will overcome the mild message to make the speech severe. However, we shall assess the other severity factors.

The next severity factor assesses the inferred or explicit intent of the speaker. Shelly does not manifest an outright intent in this scenario. The inferred intent from posting the picture is not one of serious harm, which is determined from the lack of a caption and the picture itself – from a reasonable student standard. Shelly’s intent was likely to embarrass Carly. This is not sufficient to overcome the mildness of the speech itself. Because intent and message meaning are highly correlated, it is unlikely that there will be a scenario where the intent is so severe that it
overcomes the mildness of the meaning of the message. One example where this might occur is if another student threatened to harm anyone who wore the particular sweater Carly was wearing. If Shelly posted the same photograph knowing of the third-party’s threatening statement, her intent could be inferred that she wanted Carly to be harmed. The meaning of the message is still mild: it is a picture of a student in a sweater. However, Shelly’s intent in this scenario is to cause harm to Carly.

Next, the platform for the speech can contribute to a finding of severity. Here, Shelly used Instagram. Instagram is not as popular a forum among Americans as Facebook, but it is still popular. This alone would not be sufficient to make Shelly’s speech severe. Popularity can contribute to severity because the more peers that view the harmful or threatening speech, the more damage it can cause to the subject of the speech. Finally, the media format is a public posting. While public postings are more severe than private messages, when they are unaccompanied by a serious and harmful message the speech is not severe.

Running Shelly’s speech through the digital-communications test results in the finding that the message is not severe and not pervasive. The analysis thus would stop here and an educator would not be permitted to punish a student or search any digital communication devices. Even if Carly sits in the bathroom and misses class for the rest of the week, the result would be the same. Although the disruption based on the speech is now high – a student is missing multiple classes versus just one – punishment is based on the speaker’s speech. The analysis ends when it is determined that the speech is not severe or pervasive.

In summary, the digital-communication test borrows already established principles from various sources and combines them to create a test that produces fair and consistent results. The

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test accounts for the special characteristics of the school environment and the students' constitutional rights. The proposed standard decreases educators’ discretion, yet affords it in the proper instances.
CHAPTER 5
DISCUSSION AND CONCLUSION

This thesis analyzed First and Fourth Amendment standards applied in public high schools and proposed a new test for producing more fair and consistent results. At the heart of the current First and Fourth Amendment standards is the need to balance protecting minors from cyberbullying harms with safeguarding their constitutional rights.

As attorney Carolyn Levin aptly stated, “a definitive rule is hard, if not impossible, to enunciate.”¹ Yet, a new standard that can appropriately balance students’ rights and safety is vital. The current First and Fourth Amendment tests result in “contradictory” treatments.² This is partly because the Supreme Court has yet to provide a clear test for online student speech.³ Such inconsistency does more harm than good. Without clear guidance on which behaviors are acceptable and which are not, students are thrown into a world where one wrong or misguided word choice carries the potential to forever change their lives.

As Chapter three addressed, labeling students as deviant can have detrimental impacts on their future.⁴ Specifically, the research highlighted how females who had contact with the criminal justice system were more likely to offend.⁵ Moreover, even mild forms of contact with the system was found to affect students long term employment opportunities.⁶ With no clear standards, students suffer these detrimental effects without warning or ability to avoid them.

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¹ Levin, supra note 14.
² Id.
³ See id.
⁴ See supra Chapter 3
⁵ Davies, supra note 46, at 384.
⁶ Id. at 400.
Undoubtedly, cyberbullying is a real and serious threat to students. With ill-equipped brains, teenagers are unable to properly handle stress associated with cyberbullying.\textsuperscript{7} The results lead to long-term problems, such as substance abuse, social anxiety, depression and even suicide.\textsuperscript{8} However, there will always be dangers lurking around the corner. As Justice Anthony Kennedy wrote in 2002, “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.”\textsuperscript{9} If one searches hard enough, there will always be a justification for limiting constitutional freedoms.

Throwing gasoline on a fire, technology complicates Fourth Amendment searches in public schools. The once-effective \textit{T.L.O.} standard raises substantial privacy questions related to personal communication devices. No longer is a student’s most private object a purse or backpack; rather, it is now a personal communication device. Just as strip searches require a heightened standard for intrusion, so too should personal communication device searches.

This thesis offers a solution. Borrowing from established legal principles, the proposed digital-communications test defends students’ First and Fourth Amendment rights while adequately protecting students from harm. It does so by limiting educators discretionary power and providing clear guidance on when behavior is serious enough to warrant intervention. Students are unable to weigh messages in their brain properly which results in impulsive and risky decisions.\textsuperscript{10} The proposed test takes into account students reduced cognitive abilities and provides leeway for them to learn from improper decisions.

\textsuperscript{7} Sleglova, \textit{supra} note 94, at 1.
\textsuperscript{8} Unforgettable Cases, \textit{supra} note 98.
\textsuperscript{10} Teens’ brains, \textit{supra} note 87.
While the proposed standard is advantageous when compared to the current standard, it does have limitations. One goal in creating a new First and Fourth Amendment test is to decrease educator discretion to reduce abuses of power. The proposed digital-communications test does decrease discretion, however, not completely. Wherever there is room for discretion, educators have the ability to abuse their power.

Another limitation of the digital-communications standard is that because it favors protecting speech, speech that could lead to harm might not be punished because its probability of occurring is low. For example, in scenario two discussed in Chapter four, a student threatened to kill the entire school population. The circumstances led to the conclusion that the probability of that harm occurring was low and therefore, the school was not permitted to punish the student. However, low probability is not equivalent to no probability. Thus, it is possible that the student would, in fact, attempt to shoot the entire school population. Furthermore, because the standard requires evaluation of facts, it is possible that educators assess improperly and come to a conclusion of low probability when the harm is actually likely to occur.

A third limitation of the proposed standard is that evaluation of message meaning from a reasonable student is challenging. Especially in today’s technologically driven world, word meanings fluctuate rapidly. Slang or “trendy” words are created regularly. For example, the year 2016 saw words such as “lit” and “fire” take on new meaning, while the previous year’s trendy words “on fleek” and “#squadgoals” diminished in popularity.11 Thus, overcoming the hurdle of deciphering message meaning only leads to a second hurdle: that months later, the same message has a different meaning.

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The proposed digital-communications test is the minimal constitutional floor required to protect students’ rights.12 Students should be afforded no fewer protections than those laid out in the proposed test. To inform educators about the proposed digital-communications test, two avenues should be explored. First, informing school boards across the country of the proposed test is the most effective way to enhance consistency. Because school boards control local public schools, they can adjust policies and effectively communicate the new standard. Second, presentation of this thesis at education conferences will help educators become aware of the dangers of the current tests and inform them of the proposed one. Thus, those who attend education conferences will be able to learn about the proposed test. Additionally, even if school boards do not actively change policies to follow the proposed test, an educator who learns of the test can apply it informally to future cases.

Courts, in turn, can learn of the proposed test in two ways. First, if schools implement the test and incidents are brought to the court system, then the courts will come to know of the test. Second, if a First or Fourth Amendment student online speech case is brought to the courts, an amicus brief with the proposed standard can be filed to inform them.

Future research must address three concerns. First, research should evaluate how educators and courts assess the reasonable-student standard and if the assessments are accurate. This can be accomplished through survey research asking students to explain what specific phrases or words mean to them. The research should examine various uses of the phrases and words to account for context. The results of these studies can be used by educators in the future as a reference. As mentioned in the limitations section, this will only be useful if studies like these are repeated.

frequently because as message meanings change rapidly. To evaluate accuracy, researchers can conduct a study which asks students how they would interpret specific messages from past cases or incidents. These results can then be compared to how the courts and educators actually interpreted the messages. This research will capture the accuracy of educators and courts assessments.

Second, future research should determine how often educators abuse their power due to discretion. In doing so, this will provide insight on how dangerous or safe it is to grant educators discretion. If abuse of power is frequent, then the proper test should limit discretion as much as possible. Such research might be difficult to collect because abuses of power are easily covered up by the current discretion standard. The current test does not require educators to provide explanations for their decisions. Furthermore, because the extant First Amendment standards require that the speech be likely to disrupt the school environment it is likely that any abuses of power will be masked by fake or misguided reasons.

Third, research on the effects of various punishments on students is important. If certain punishments do not detrimentally harm students, they can be used more frequently than punishments that do cause harm. For example, consider detention versus expulsion. The punishment of expulsion is more detrimental to a student than detention. However, the differences between in-school suspension and out-of-school suspension are less obvious. A future study can use longitudinal research to gather this information. For example, a study can track students who have been punished for a number of years after the punishment to observe and report their future outcomes. The results might guide a standard that more adequately protects constitutional rights but allows for punishment of wrongful conduct.
The proposed digital-communications test is imperfect. However, compared to current First and Fourth Amendment standards used in public schools, the proposed test significantly reduces problems and adequately safeguards students’ constitutional rights.
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BIOGRAPHICAL SKETCH

Stephanie Alexa McNeff was born in Allentown, Pennsylvania and spent the first part of her life in Commack, New York. After moving to Florida as a teenager, Stephanie McNeff began her undergraduate studies at the University of Florida in fall of 2010. Three years later she graduated with a Bachelor of Arts in criminology and a Bachelor of Science in psychology. One year later in 2014 she received her Master of Arts degree in criminology, law and society.

In the fall of 2014, Stephanie McNeff began her studies of law at the University of Florida Levin College of Law where she pursued a joint degree in mass communication. After her graduation, she plans to join the legal field as an attorney.